STATUTORY BASIS FOR STANDARDS OF PRACTICE IN CASES OF EDUCATIONAL MALPRACTICE

By

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by

Margaret Mary Nonnemacher

In loving memory of

My mother, Lois Ruth Cope Nonnemacher

and

My aunt, M. Lucile Cope Tyler

and

In honor of

My father, Robert Milton Nonnemacher

They have all been outstanding educators

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As public dissatisfaction with schools and teachers increases, there has been a growing demand for accountability in educational performance. Citizens have taken their concerns to the courts by suing teachers and schools for failure to educate properly. The courts have stated that without standards of care by which to judge the actions of educators, there can be no finding of negligence, termed educational malpractice. The purpose of this study was to determine if there were written standards of care which could create a basis for liability in cases of educational malpractice. Medical malpractice cases were analyzed to determine trends in development of standards for individual practitioners and institutions. Legal analysis was carried out on the published statutes defining educational accountability requirements for each state. Findings were grouped into topics and further analyzed for

trends in development of specific standards for the individual educator and for educational institutions. Trends in medicine included 1) nationally established standards based on national testing for licensure, 2) reliance on accreditation standards and locally established policies for institutions, 3)recognition of institutions as active participants in treatment, and 4) definition of some procedures as common knowledge. Trends in statutory requirements for educators included the following: 1) increasing use of a national level test for teacher credentialing, 2) standardized testing of basic literacy for both teachers and students, 3) use of standardized testing for identification of individual student deficits, and 4) requirements for accreditation of educational institutions and teacher training programs. The results of this study indicate there is a statutory basis for standards of practice in cases of educational malpractice.

GENERAL AUDIENCE ABSTRACT

As public dissatisfaction with schools and teachers increases, there has been a growing demand for accountability in educational performance. Citizens have taken their concerns to the courts by suing teachers and schools for failure to educate properly. Courts have generally have not found teachers and schools guilty stating there are no standards defining expected performance for educators. Years ago, when a patient sued doctors and hospitals, the courts indicated they could not judge performance of medical practitioners because there were no standards defining performance in medicine. Today there are multiple standards in medicine recognized by the courts and medical practitioners must be aware of these standards to practice safely. The results of this study provide individual educators and educational institutions, both in the state of Florida and nationwide, with information on developing trends in statutorily based standards of performance. Knowledge of state laws defining practice allow educators to minimize their risk of liability for failure to properly educate.

CHAPTER I
INTRODUCTION

Law suits against educators are not new. As early as 399 B.C. socrates was charged with "corruption of the young".[1] Somewhat more recently John scopes was involved in a widely publicized trial for teaching evolutionary theory.[2] It has been estimated that between 1,200 and 3,000 suits for tort liability are brought against teachers and administrators annually.[3] What has changed fairly significantly over the years is the responsibility placed on school systems, institutions, and educators for the quality of the product of the educational endeavor--a knowledgeable student.

In early European education systems such as those found in Bologna and Paris, the students had full control of not only the curriculum but the hiring and firing of

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[1] Cited in Allan C. Ornstein & Harriet Talmage, *The Rhetoric and the Realities of Accountability,* TODAY'S EDUCATION, Sept.-Oct. 1973, at 70.

[2] John Scopes v. State of Tennessee, 152 Tenn. 424, 278 S.W. 57, 154 Tenn. 105, 289 S.W. 363 (1927).

[3] EUGENE T. CONNERS, EDUCATIONAL TORT LIABILITY AND MALPRACTICE (1981). Conners noted that approximately one-third of the suits brought are settled out of court, one-third are dismissed, and one-third go before a jury. Only those suits that make it to the appellate level are reported.

professors.[4] Colonial America placed primary responsibility for education on the family.[5] As the Industrial Revolution brought an increased demand for training in complex tasks, state and local governments gradually assumed the task of providing compulsory, tax-supported school systems.[6]

The importance of education in American society was recognized by the judiciary in the 1954 landmark case of *Brown* v. *Board of Education* when the court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures of education both demonstrate our recognition of the importance of education to our democratic society. . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally . . . it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[7]

While the opportunity for education is specified in the constitutions of most states and the District of Columbia[8],

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[4] *See generally* THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES, VOL. 1, 148-167 (F.M. Powicke & A.B. Emden eds., 1936).

[5] Nancy L. Woods, *Educational Malfeasance: A New Cause Of Action For Failure To Educate?* 14 TULSA L.J. 383 (1978):384, *See generally* RENNARD STRICKLAND ET AL., AVOIDING TEACHER MALPRACTICE 1 (1976).

[6] Woods, *supra* note 5.

[7] 374 U.S. 483, 493 (1954).

[8] *See e.g.*, ALA.CONST. art. XIV, § 256 (amended 1956), ALASKA CONST. art. VII, § , ARIZ. CONST. art. XI, § 1, CAL. CONST. art. IX, § 1, COLO. CONST. art. IX, § 2, CONN. CONST. art. 8, § 4, DEL. CONST. art. X, § 4, GA. CONST. art. 8, § 1, HAW. CONST. art. X, § 1, IDAHO CONST. art. 9, § 1,

the quality of that education has been the subject of growing concern at both the K-12 and post-secondary levels.[9] In a 1970 speech, President Richard M. Nixon challenged schools to improve their standards and called for teachers and school administrators to be held accountable for their performance.[10] Mehrens and Lehmann expressed concern about who should be held accountable for problems in education noting, "It seems to us that the pendulum has swung too far toward holding educators accountable for lack of pupil learning in spite of any failures, deficiencies, and incompetence in the students and/or parents."[11] However,

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ILL. CONST. art. X, § 1, KAN. CONST. art. 6, § 1, KY. CONST. § 183, LA. CONST. art. VIII, § 1, ME. CONST. art. VIII, pt. 1, § 1, MD. CONST. art. VIII, § 1, MASS. CONST. pt. 2, ch. 5, § II, MICH. CONST. art. VIII, § 2 (1963, amended 1970), MINN. CONST. art. XIII, § 1, MISS. CONST. art. 8, § 201 (1890, amended 1960), MO. CONST. art. IX, § 1(a), MONT. CONST. art. X, § 1 NEV. CONST. art. 11, sec. 1, N.H. CONST. pt. 2, art. 83, N.J. CONST. art, 8, § 4, par.1, N.M. CONST. art. XII, § 1, N.Y. CONST. art. XI, § 1, N.C. CONST. art. IX, § 1, N.D. CONST. art. VIII, § 1 OHIO CONST. art. VI, § 3, OKLA. CONST. art. XIII, § 1, R.I. CONST. art. XII, § 1, S.C. CONST. art. XI, § 3, S.D. CONST. art. VIII, § 1, TENN. CONST. art. XI, § 12, TEX. CONST. art. VII, § 1, VT. CONST. ch.II, § 68 (1793, amended 1954, 1964), VA. CONST. art. VIII, sec.§ 1, WASH. CONST. art. IX, § 1, W. VA. CONST. art. XII, § 1, WIS. CONST. art. X, § 3 (1848, amended 1972, WYO. CONST. art. VII, § 1.

[9] Ornstein & Talmage, *supra* note 1.

[10] Richard M. Nixon, Special Message to the Congress on Education Reform (March 3, 1970), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, RICHARD M. NIXON 228, 230 (1970).

[11] WILLIAM A. MEHRENS & IRVIN J. LEHMANN, MEASUREMENT AND EVALUATION IN EDUCATION AND PSYCHOLOGY 497 (4th ed. 1991).

they go on to state, "Just because educators are not accountable for everything does not mean that they are not accountable for anything."[12]

Almost two decades ago reports and articles began to reflect the public's dissatisfaction with the quality of education being provided in America's schools.[13] Problems cited ranged from a lack of clearly defined educational goals to poor discipline and academic credit for virtually any activity. Other reports indicated a general decline in the academic ability of high school graduates.[14] Critics of the educational system argued that declining test scores represented confirmation that schools were failing in their primary task of educating students.[15] Educators blamed shrinking financial resources, parents, television, and various social forces for the declining capabilities of their students.

In apparent frustration some dissatisfied citizens turned to the courts for help. In 1972 the state of California heard a case alleging a school system had failed

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[12] *Id.* at 498.

[13] *See, e.g.* NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM (1984), WILLIAM BENNETT, TO RECLAIM A LEGACY: A REPORT ON THE HUMANITIES IN HIGHER EDUCATION (1984).

[14] *See, e.g.* LAWRENCE LIPSITZ, THE TEST SCORE DECLINE: MEANING AND ISSUES (1977).

[15] *Id.* at 44.

to properly educate a high school student.[16] The court ruled in favor of the school district refusing to recognize a cause of action sounding in negligence.[17] In the ruling the court cited a lack of workable standards by which educators, individually or as a group, can be judged,[18] and public policy issues.[19]

Since that first California case, courts in many states have ruled on cases alleging educational malpractice. While the majority of the cases have been brought against K-12 public schools,[20] cases have also involved public higher education institutions[21] and private schools at all levels.[22] To date, only Montana has recognized at least a limited

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[16] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

[17] *Id.* 60 Cal. App. 3d 814, 817, 131 Cal. Rptr. 854, 855.

[18] *Id.* 60 Cal. App. 3d 814, 825, 131 Cal. Rptr. 854, 861.

[19] *Id.*

[20] *See*, e.*g.* Hunter v. Board of Education, 47 Md. App. 709, 425 A.2d 681 (1981), Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 376 (1979), Hoffman v. Board of Education 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

[21] *See*, e.*g.* Dizick v. Umpqua Community College, 330 Or. App. 559, 577 P.2d 534 (1978), Tanner v. Board of Trustees of the University of Illinois, 363 N.E. 2d 208 (1977), Chevlin v. Los Angeles Community College District, 212 Cal.App.3d 386, 260 Cal.Rptr. 658 (1989).

[22] *See*, e.*g.* Helm v. Professional Children's School, 431 N.Y.S.2d 246 (1980), Paladino v. Adelphi University, 89 A.D.2d 85, 454 N.Y.S.2d 868 (1982), Ross v. Creighton University, 740 F.Supp. 1319 (N.D.Ill. 1990).

liability for educational malpractice.[23] Although a few dissenting opinions have been written, the final decisions in all of the cases have been in favor of the schools. Many of the rulings simply cited issues of public policy as the sole basis of denial. Others agree with the Peter W. court that no duty can be recognized because of the lack of standards.[24]

The problems of public policy and standards of care may appear to be quite separate, but are actually closely related. American jurisprudence is based on common law and as such is constantly evolving. As issues arise and levels of public concern and awareness change, the court's willingness to intervene also changes. With progress in knowledge and technology, concomitant changes occur in the standards of care to which individuals or groups are held. Nowhere has this change been more evident than in medical malpractice. Scientific advances in recent years have given rise to actions for pre- and postnatal injuries that would not have been considered in the past.[25]

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[23] B.M. v. State, 200 Mont. 58, 649 P.2d 425 (1982) (based acknowledgment of the cause of action on state statutory requirements of special education placement not failure to educate).

[24] See *infra* notes 83-87 and accompanying text.

[25] Examples of such actions will be discussed in Chapter 2.

Malpractice, also termed professional negligence, has been recognized as a cause of action against many other groups such as lawyers,[26] architects and engineers,[27] and accountants,[28] but undoubtedly the most well developed body of case law is in the area of medical malpractice. Like educational malpractice, courts originally cited public policy issues and poor understanding of standards in medical practice for their reluctance to hold doctors and surgeons liable for their actions. Unlike the educational field, however the courts now readily accept the concept of medical malpractice. Standards have evolved and continue to do so as knowledge and technology advance. So why have the courts continued in their reluctance to recognize an educator's responsibility to properly educate?

Educational malpractice has not yet been defined by a court, perhaps because to do so would imply legal recognition. Legal scholars and commentators on the subject provide some guidance: "The idea is that the educator

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[26] *See, e.g.* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE,(3rd ed. 1989), Donald G. Weiland, *Another Early Chapter: Attorney Malpractice and the Trial Within a Trial: Time for Change*, 19 J.MARSHALL L.REV. 275 (1986), JEFFREY M. SMITH, PREVENTING LEGAL MALPRACTICE (1981).

[27] *See, e.g.* Donnelly Construction Co. v. Oberg/Hunt/Gillelend, 139 Ariz. 184, 677 P.2d 1292 (1984), 97 A.L.R.3d 455.

[28] *See, e.g.* Western Surety Co. v. Loy, 3 Kan. App.2d 310, 594 P.2d 257 (1979), John W. Dondanville, *Defending Accountants' Liability: Trends and Implications*, 15 FORUM 173, 92 A.L.R.3d 396 (1979).

(individually, collectively, or institutionally) has some legal obligation to carry out the function of academic instruction in such a manner as to impart some minimal level of competence in basic subjects to the students."[29] A failure to adequately educate is a failure to properly equip the student with the basic knowledge and skills required to function satisfactorily in the world of work.[30] Sometimes educational malpractice is described, in terms more specific to legal theory, as services rendered for the benefit to another which are less than what is generally expected of a person or agency in that position,[31] or an intentional or negligent act or failure to act constituting a breach of duty to properly educate.[32] Essex would add that which is "generally expected" includes components of reasonable guidance, counseling, and instructional supervision.[33]

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[29] Richard Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 746-747 (1987).

[30] Nathan L. Essex, *Teacher Malpractice - Fact or Fantasy?*, 21 THE TEACHER EDUCATOR 2, 2-3 (1986).

[31] J. JOHN HARRIS III & DAVID G. CARTER, Sr., SCHOOL LAW IN CONTEMPORARY SOCIETY 243, 249 (M. A. McGhehey ed., 1980).

[32] ARLENE H. PATTERSON, SCHOOL LAW UPDATE...PREVENTIVE SCHOOL LAW 69, 71 (Thomas N. Jones & Darel P. Semler eds. 1984).

[33] *Supra* note 30 at 21.

Purpose of the Study

The purpose of this study was to determine if there are written standards of care which could create a basis for liability in cases of educational malpractice. It was believed that the findings might provide a remedy under the theory of negligence in the law of tort to cover the harms caused by negligence in education. The following research questions were addressed:

1. How might the development of standards of care in medical malpractice be used by the courts in the recognition of standards of care for educators?

2. What educational accountability requirements currently mandated by state legislatures are creating standards of care that potentially assign liability to educators?

Background for the Study

The concept of accountability in education includes such things as setting goals in terms of student outcomes, evaluation of goal achievement, reporting information to the public, and accepting responsibility for inadequacies in performance.[34] Efforts at educational accountability have taken many forms the most common of which are minimum competency testing, competency based education,

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[34] *Ibid.*

accreditation, and licensure and/or certification of teachers.

In the basic format of minimum competency testing (MCT) some minimum level of acceptable performance is set, usually in the basics of reading, writing, and mathematics, then all students of a specified population are given a standardized test. While the use of MCT is widespread,[35] the purpose of the testing varies: graduation requirement for high school diploma,[36] identification of learning problems with emphasis on early intervention and remediation, for passage from one grade level to the next,[37] and comparative evaluation of the performance of individual educators and schools in attainment of district goals. Several writers have been critical of minimum competency testing and note that it has not had the intended effect of educational reform.[38] Others express concerns that such standardized testing simply represents a politically expedient way to appease

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[35] In a January 1997 report, 41 states had mandated competency tests in basic skills. EDUCATION WEEK SUPPLEMENT 14, Januray 22, 1997 at 34-35.

[36] 19 states require passing score for diploma. EDUCATION WEEK 9, May 9, 1990 at 30.

[37] This occurs at both K-12 and post-secondary levels.

[38] *See generally* MITCHELL LAZARUS, GOODBYE TO EXCELLENCE: A CRITICAL LOOK AT MINIMUM COMPETENCY TESTING, 3 (1981), ANDREW J. STRENIO, Jr., THE TESTING TRAP (1981), H. DICKSON CORBETT & BRUCE L. WILSON, TESTING, REFORM, AND REBELLION (1991), DEFINING AND MEASURING COMPETENCE (Paul S. Pottinger & Joan Goldsmith eds. 1979).

taxpayers.[39] Educators express concerns about the discriminatory impact of MCT on minorities and the handicapped, the general appropriateness of use for determination of placement or diplomas, and the tendencies to "teach to the test".[40] However, a recent survey indicates the American public supports the use of nationally standardized tests.[41]

Competency based education (CBE), like minimum competency testing, is concerned with standards, goal attainment, and accountability, but it tends to be broader in scope and more complex.[42] Goldhammer and Weitzel point out that the perspective of the observer tends to influence the actual definition so that those defining CBE in K-12 public schools emphasize outcome assessment through minimum competency testing while those from post-secondary and adult education "...stress acquisition of generic skills and the individualized nature of competency attainment."[43] Once

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[39] FROM POLITICS TO POLICY: A CASE STUDY IN EDUCATIONAL REFORM 19, 28 (Joan M. Matthews et al. eds., 1991), CORBETT & WILSON, *supra* note 38.

[40] *See generally* JOSEPH BECKHAM, LEGAL IMPLICATIONS OF MINIMUM COMPETENCY TESTING (1980).

[41] Lowell C. Rose, Alec M. Gallup, and Stanley M. Elam *The 29th Annual Gallup/Phi Delta Kappa Pole of the Public's Attitude Toward Public Schools*, 79 PHI DELTA KAPPAN 41, 46 (1997).

[42] LAZARUS, *supra* note 38 at 3.

[43] KEITH GOLDHAMMER & BRUCE WEITZEL, COMPETENCY-BASED EDUCATION: BEYOND MINIMUM COMPETENCY TESTING 42, 49 (Ruth

again concerns about political pressures are expressed: "It should be noted that decisions concerning the selection of required competencies are highly susceptible to political realities and prevailing public expectations, including mandates issued or legislated by state governments...."[44]

Another form of accountability that has grown rapidly is accreditation of both institutions and programs.[45] Although most commonly encountered at the higher education level, accreditation affects all levels of education, particularly when the accreditation of teacher education is involved. Traditionally both institutional and program specific accrediting bodies have emphasized areas such as consistency of mission and purpose, resource acquisition and allocation, program structure and faculty qualifications, but actual educational effectiveness was only implied or assumed.[46]

In the mid-1980s assessment of the educational accomplishments of students became a separate initiative under the guidance of Secretary of Education William

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Nickse & Larry McClure eds., 1981).

[44] *Id.* at 54-56.

[45] *See generally* KENNETH YOUNG ET AL., UNDERSTANDING ACCREDITATION (1983).

[46] Bonnie M. K. Hagerty and Joan S. Stark, *Comparing Educational Accreditation Standards in Selected Professional Fields*, 60 JOURNAL OF HIGHER EDUCATION 3 (1989), Patrica Thrash, *Educational Outcomes in the Accrediting Process*, ACADEME, July-Aug. 1988 at 16.

Bennett.[47] This change in emphasis, termed outcomes assessment, was reflected in changes in the federal regulations recognizing accrediting agencies.[48] As a component of accreditation, there are expectations of the institution for outcomes assessment.

1. Translation of mission into specific goals, objectives, and educational outcomes.

2. Provision of a systematic procedure for measuring the effectiveness of methods for achieving goals and outcomes.

3. Systematic and regular collection and analysis of outcomes data.

4. Use of the data collected in decision making, policy setting, planning, and resource allocation.

5. Demonstration of effectiveness of achieving its educational outcomes.[49]

Specialized accrediting bodies that deal with specific programs or professional fields have similar expectations.[50]

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[47] James O. Nichols and Lori A. Wolff, *Organizing for Assessment*, In ORGANIZING EFFECTIVE INSTITUTIONAL RESEARCH OFFICES: NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH, No.66, at 81 (1990).

[48] 34 C.F.R. Chap VI, Part 602 at 202.

[49] *Supra* note 45 at 356. *See generally* TRUDY BANTA, IMPLEMENTING OUTCOMES ASSESSMENT: PROMISE AND PERILS: NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH, No. 59 (1988), ASSESSING THE OUTCOMES OF HIGHER EDUCATION: PROCEEDINGS OF THE 1986 ETS INVITATIONAL CONFERENCE (1986).

[50] *See, e.g.* COMMISSION ON ACCREDITATION IN PHYSICAL THERAPY EDUCATION, EVALUATION CRITERIA FOR ACCREDITATION OF EDUCATION PROGRAMS FOR THE PREPARATION OF PHYSICAL THERAPISTS (1996), COMMISSION ON DENTAL ACCREDITATION, STANDARDS FOR ADVANCED EDUCATION PROGRAMS IN GENERAL PRACTICE RESIDENCY (1990).

The accreditation of teacher education programs is handled by the National Council for the Accreditation of Teacher Education (NCATE). While efforts have been made to improve and strengthen this accreditation system,[51] serious problems are still evident. Generally graduation from an NCATE-accredited teacher education program is not a requirement for state certification.[52] Compounding this problem is the wide variation in requirements by individual states for the regulation and approval of teacher education programs.[53] Of the nation's approximately 1,200 institutions that train educators, less than fifty percent are NCATE accredited.[54]

The fourth form of accountability central to the background of this study is teacher licensure/certification. Licensure and certification are frequently used synonymously, but do not always represent the same thing.[55] Stated simply the profession issues the certificate and the

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[51] In 1985 NCATE completed a major reorganization and developed more demanding standards, a broader representation of the professions, and a system of eleven pre-conditions to the accreditation process. E. GRADY BOGUE & ROBERT L. SAUNDERS, THE EVIDENCE FOR QUALITY: STRENGTHENING THE TESTS OF ACADEMIC AND ADMINISTRATIVE EFFECTIVENESS 49 (1992).

[52] *Id.* at 50.

[53] *Id.* at 51.

[54] *Supra* note 35 at 27.

[55] *Id.* at 120.

state issues the license.[56] In education, however, this distinction has become somewhat blurred. Licensure is the process by which an individual is granted authority to practice in a particular field.[57] Licensure serves several purposes in the public interest by providing

> 1. Reasonable assurance that a licensee has fulfilled requirements deemed by experts to be essential for safe entry into the field.
>
> 2. Identification and publication of the knowledge and skills necessary for good performance.
>
> 3. Assistance in the regulation and policing of a profession including the maintenance of proficiency.
>
> 4. A form of quality assurance by making sure preparation programs keep curricula attuned to requisite knowledge and competencies and graduates of the programs are adequately prepared to meet the license requirements.[58]

On the other hand, certification may either indicate a process of granting the right to practice or the meeting of prescribed requirements to engage in a specified practice after licensure has been attained.[59] As noted above, while graduation from an accredited program or institution is required for licensure or certification in many fields it is generally not a requirement in teaching.

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[56] CARNEGIE FORUM ON EDUCATION, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY 65 (Task Force on Teaching as a Profession, 1986).

[57] *Supra* note 51 at 31.

[58] *Id.* at 121.

[59] *Id.*

In summary, the courts have recognized the importance of education[60] and states have constitutionally supported the provision of education,[61] but multiple questions and concerns about the quality of the education provided at all levels have also been posed. Efforts at educational reform based on the concept of accountability of both the institution and individual educators are ongoing. Some of the common forms of these accountability efforts are minimum competency testing, competency based education, accreditation, and licensure/certification. Central to all of these efforts is the assumption that there are standards that can be used as benchmarks of performance.

Theoretical Framework of the Study

The law grants to each individual certain personal rights with regard to conduct which others must respect. The law also imposes corresponding duties and responsibilities on each individual to respect the rights of others. If one fails to respect these rights and damages another, a tort has been committed and the offending party may be held liable.[62] Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court

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[60] *Supra* note 7.

[61] *Supra* note 8.

[62] KERN ALEXANDER, SCHOOL LAW 689 (1980).

will provide a remedy in the form of an action for damages.[63] Liability must be based on conduct that is socially unreasonable. The tort-feasor is usually held liable for acting with an intention that the law treats as unjustified, or acting in a way that departs from a reasonable standard of care.[64] A person is subject to liability if the character of the conduct makes him liable for another's injuries only if two additional conditions exist. First, that conduct must be a recognized legal cause of liability. Second, there must be no defense applicable to the claim made by the injured party.[65] Thus a person may be subject to liability, but the liability may never accrue.[66]

Within the law of torts, the cause of action that was used as the basis of this study was that of negligence. The traditional elements necessary for negligence to be recognized as a cause of action are as follow:

> 1. A duty or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct.[67]

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[63] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1 at 2 (1984)(hereinafter PROSSER).

[64] *Id.* at 6.

[65] RESTATEMENT (SECOND) OF TORTS § 5 at 9-10 (1965).

[66] *Id.* at 10.

[67] PROSSER, *supra* note 63, § 30 at 164.

2. A failure on the person's part to conform to the standard required: a breach of the duty.[68]

3. A reasonably close causal connection between the conduct and the resulting injury.[69]

4. Actual loss or damage resulting to the interest of another.[70]

The concept of negligence presupposes some uniform standard of conduct.[71] Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk.[72] This standard is generally defined as that of the reasonable, ordinary, and prudent person under the same or similar circumstances.[73] Although the reasonable man is a fictitious person, the chief advantage of this standard is that it enables the triers of fact to look to a community standard rather than an individual one.[74] In legal phraseology, negligence is more nearly synonymous with carelessness than with any other word and signifies

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[68] *Id.*

[69] *Id.* at 165.

[70] *Id.*

[71] *Id.* § 32 at 173.

[72] RESTATMENT (SECOND) OF TORTS § 283 at 12.

[73] PROSSER, *supra* note 63, § 32 at 174-175.

[74] *Supra* note 72 at 13.

primarily the want of care, caution, attention, skill, or discretion in the performance of an act.[75]

Several other legal theories have been proposed either singly or in combination in an attempt to state a cause of action in educational malpractice.[76] Central to all of the cases, however, is the concept of negligence in the theory of torts and the establishment of standards by which to measure conduct.

Significance of the Study

A threshold question in any action for negligence against a teacher, school system or institution is whether sovereign immunity bars the suit.[77] This bar has been abrogated either expressly or by implication in most states.[78] That being the case, the first major condition that must be shown by a plaintiff stating a cause of action in educational malpractice is that the educator owed the student a duty of care. A plaintiff might use two possible origins to develop a legal basis for duty owed: common-law

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[75] THOMAS G. SHERMAN and AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 2 at 4 (2nd ed. 1870).

[76] These theories include breach of contract, misrepresentation, and violation of constitutional or statutory rights. Each will be discussed in the following chapter in the review of literature.

[77] Terrence P. Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J. LAW & EDUC. 479, 481 (1982).

[78] PROSSER, *supra* note 63, § 131 at 1044.

principles and statutory enactments.[79] Closely related to the creation of a duty is the necessity to demonstrate that there are standards by which the performance of that duty can be evaluated. Without a standard of care no duty of care can be attached and no tort liability results.[80] Common-law principles and statutory enactments present a potential source of standards of care.

While many other problems of proof have been noted by courts hearing cases of educational malpractice,[81] few have received the attention that the problem of lack of standards has presented. The *Peter W.* court stated: "Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standard of care, or cause, or injury."[82] Several other courts have cited and followed with this reasoning.[83] The court in *Donohue*

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[79] Destin S. Tracy, *Comment - Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction*, 58 N.C.L. REV. 561, 565 (1980), Karen H. Calavenna, *Comment - Educational Malpractice*, 64 U. DET. L. REV. 717, 726 (1987).

[80] Laurie S. Jamieson, *Educational Malpractice: A Lesson in Professional Accountability*, 32 B.C.L. REV. 899, 946 (1991).

[81] Additional problems noted include demonstrating proximate cause, definition of injury, and calculation of damages.

[82] Peter W., 60 Cal. App. 3rd at 824, 131 Cal. Rptr. at 860-861.

[83] Donohue v. Copiague Union Free School District, 407 N.Y.S.2d 874, 878 (1978), Hoffman v. Board of Education, 439 A.2d 582, 584 (1982), Moore v. Vanderloo 386 N.W.2d 108, 114 (1986)

specifically stated in dicta that the creation of a workable standard of care did not pose an insurmountable burden,[84] but followed *Peter W.* in holding that educational malpractice could not be recognized as a cause of action based on public policy.[85] In a dissenting opinion, Justice Suozzi pointed out that there is no reason to differentiate between educational malpractice and other forms of negligence.[86] Judge Davidson also supported holding educators to a duty of care noting the standard of care should be based on customary conduct.[87]

The courts have stated a reluctance to enter the arena of instruction and evaluation of student performance for two major reasons: lack of agreement among educators on even the most basic of standards and the traditional position of non-interference of the judiciary in educational policy-making. In *Peter W.* the court stated "The science of pedagogy itself is fraught with different and conflicting theories of how and what a child should be taught . . . ."[88] The courts

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[84] Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 443, 391 N.E.2d 1352, 1353, 418 N.Y.S.2d 375, 377.

[85] *Id.*, 47 N.Y.2d at 445, 418 N.Y.S.2d at 378.

[86] Donohue, 407 N.Y.S.2D 874, 883 (1978) (Suozzi, J. dissenting).

[87] Hunter v. Board of Education of Montgomery County, 439 A.2d 582, 589 (1982)(Davidson, J. concurring in part and dissenting in part).

[88] Peter W., 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 860-61.

have apparently dismissed the idea there could be any professional consensus on what would be negligent or non-negligent.[89] While there continue to be wide differences of opinion about the goals of education, how to implement specific programs, how students learn, and specific methodology, the efforts toward accountability during the past twenty years perhaps provide some guidelines about expected outcomes of the educational process. With few exceptions, it is the product or outcome of the educational process plaintiffs are concerned with and not the pedagogical principles used during that process.

If legally recognizable standards were found to exist, judicial reluctance to be involved in educational policy matters might also be modified. Several commentators have suggested that educators themselves are the most qualified to develop educational policy.[90] The existence of legally recognized standards to guide educational policy-making would change the judiciaries role from one of setting policy to the more common one of ruling on the appropriateness in the application of existing or developing policy. By using standards developed by educators to determine proper

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[89] Patrick D. Lynch, *Educational Policy and Educational Malpractice*, CONTEMPORARY LEGAL ISSUES IN EDUCATION 209, 212-213 (M. A. McGhehey ed., 1979).

[90] John Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U. L. REV. 641, 677 (1976), Funston, *supra* note 29 at 798.

behavior, courts avoid interfering with professional judgement.[91] For example in *Hoffman*[92] the lower court premised liability on the failure of the school district to implement its own policy to retest after two years students classified as educationally handicapped.[93]

Because many of the accountability efforts establishing outcome measures in education have occurred since the precedent setting cases of the mid-1970s, it is unknown how these standards might influence future judicial reasoning in the recognition of a cause of action in educational malpractice. There are many potential sources of both self-imposed and externally mandated guidelines that the courts might use. The evolution of the recognition of standards in medical malpractice will be used as a model.

Delimitations and Limitations of the Study

1. Analysis of educational malpractice cases began with the first reported case specifically using this terminology in 1976 until the present.

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[91] Catherine D. McBride, *Educational Malpractice: Judicial Recognition of a Limited Duty of Educators Toward Individual Students; A State Law Cause of Action for Educational Negligence*, 1990 U. ILL. L. REV. 475, 490 (1990).

[92] Hoffman v. Board of Education, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

[93] Hoffman v. Board of Education, 410 N.Y.S.2d 99, 110-111 (1978). The appellate court returned to the argument of non-interference in educational decisions and reversed the finding of the lower court. 49 N.Y.2d 121, 127, 424 N.Y.S.2d 376, 379 (1979).

2. Medical malpractice cases that demonstrated the evolution of standards analogous to those potentially applicable to education were selected.

3. Specific state by state review of administrative policies such as those published by state boards or departments of education were not included.

4. Since no case alleging educational malpractice has been ruled on by the United States Supreme Court, there is no single source of precedent to guide the lower courts.

5. When legal theory is applied to new areas with no precedent available, there is heavy reliance on analogy. However, courts consider each case on the facts presented and may choose to reject even the most clearly constructed analogy.

6. Statutes are continuously changing. The statutes cited in this study were verified by published documents current as of January 1998.

Definition of Terms

The primary source for the definition of all legal terms used in this study was *Black's Law Dictionary*.[94] Other sources are cited directly in the text.

Doctrine is a rule, principle, theory or tenet of the law.[95]

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[94] BLACK'S LAW DICTIONARY (6th ed. 1990).

[95] *Id.* at 481.

Legal duty is an obligation recognized by law which requires an actor to conform to a certain standard of conduct for the protection of others against unreasonable risk.[96]

Liability is a broad legal term referred to as of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely.[97]

Malfeasance is the doing of an act which a person ought not to do at all or the unjust performance of some act which the party had no right or which he had contracted not to do.[98]

Malpractice is professional misconduct or reasonable lack of skill. Failure of one rendering professional services to exercise that degree of skill and learning commonly applied by the average, prudent, reputable member of the profession.[99]

Misfeasance is the improper performance of some act which a person may lawfully do.[100]

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[96] *Id.* at 893.

[97] *Id.* at 914.

[98] *Id.* at 956.

[99] *Id.* at 958.

[100] *Id.* at 1000.

Negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would not do. It is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like. The doctrine of negligence rests on the duty of every person to exercise due care in his conduct toward others from which injury may result.[101]

Nonfeasance is the nonperformance of some act which a person is obligated or has responsibility to perform, the omission to perform a required duty at all, or total neglect of duty.[102]

Respondeat superior means "Let the master answer." This doctrine or maximum means that a master is liable in certain cases for the wrongful acts of his servant. Under this doctrine an employer is liable for injury to person or property of another proximately resulting from acts of employee done with in the scope of his employment in the employer's service.[103]

Sovereign immunity is a judicial doctrine which precludes bringing suit against the government without its consent. It bars holding the government or its political subdivisions liable for the torts of its officers or agents

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[101] *Id.* at 1032.

[102] *Id.* at 1054.

[103] *Id.* at 1311-1312.

unless such immunity is expressly waived by statute or by necessary inference from legislative enactment.[104]

Standard of care, in the law of negligence, is that degree of care which a reasonably prudent person should exercise in same or similar circumstances. If a person's conduct falls below such standard, he may be liable in damages for injuries or damages resulting from his conduct.[105]

Stare decisis means to abide by, or adhere to, decided cases. Once a court has laid down a principle of law as applicable to a certain state of facts, accrording to this doctrine subsequent courts should adhere to that principle, and apply it to all future cases, where facts are substantially the same, regardless of whether the parties and property are the same.[106]

The word harm implies the existence of a loss or detriment in fact to a person.[107] Such loss or detriment may impair a person's physical, emotional, or aesthetic well-being, his pecuniary advantage, his reputation, or any other legally recognized interest.[108]

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[104] *Id.* at 1396.

[105] *Id.* at 1404-1405.

[106] *Id.* at 1406.

[107] *Id.*

[108] *Id. See generally* RESTATEMENT (SECOND) OF TORTS, § 1 (discussing the word interest).

The word injury is used to denote the invasion of any legally protected interest of another and may refer to actual bodily harm or just the fear of an intentional and immediate bodily contact.[109]

[109] *Id.* § 7 at 13.

CHAPTER II
REVIEW OF LITERATURE

Before reviewing the literature specific to this study, an overview of the concepts of tort law and liability is provided to give a frame of reference. Next educational malpractice is discussed, including categories of cases and legal theories on which cases have been brought. The theory central to this study, negligence, and the elements of duty, standard of care, causation, and injury required to sustain an action, are reviewed at length. Finally medical malpractice and the establishment of standards of care for individuals and institutions are examined.

The purpose of this study was to determine if there are written standards of care which could create a basis for liability in cases of educational malpractice. It is believed that the findings might provide a remedy under the theory of negligence in the law of tort to cover the harms caused by negligence in education. The following research questions were addressed:

1. How might the development of standards of care in medical malpractice be used by the courts in the recognition of standards of care for educators?

2. What educational accountability requirements

currently mandated by state legislatures are creating standards of care that potentially assign liability to educators?

Tort Law

There have been many attempts by legal scholars and the courts to define tort. Part of the difficulty in defining tort is the longstanding controversy on whether the law of tort is a general set of doctrinal rules and principles applicable to all conduct, or whether there is a law of torts that lists specific acts and omissions into which all actionable injuries must fall. Within the concept of tort laws as an enumeration of actionable injuries, only that harm which falls within one of the specified categories entitles the aggrieved to a legal remedy.[1] This exclusionary approach has led to a tort being defined as the breach of a noncontractual legal duty owed to the plaintiff[2] or a civil wrong other than breach of contract.[3] However, Ward points out that the "mere enumeration of actionable injuries" approach to describing torts causes multiple difficulties because each attempt to

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[1] PHILIP A. LANDON, POLLOCK'S LAW OF TORTS 45 (15th ed. 1951).

[2] Overby v. Johnson, D.C.Mich., 418 F. Supp. 471,472 (1976).

[3] W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS, 5th ed. (1984) § 1 at 2,(hereinafter PROSSER), K Mary Corp. v. Ponsock, 732 P. 2d 1364, 1368, 103 Nev. 39 (1987).

catalog the types of torts tends to leave out a significant number of cases.[4]

In rejecting the specific categorical view of torts, other writers have noted that "[n]o terse definition can meaningfully describe all that falls within the four corners of the law of torts; no short catalogue of misdeeds can exhaust the field."[5] In his early writings Sir Frederick Pollock proposed that the law of torts was a collective name for the rules governing many species of liability, but there were certain broad features in common.[6] Various courts have defined torts as a breach of legal duty,[7] the violation of a right given or the omission of a duty imposed by law,[8] or a violation of some duty owing to the plaintiff imposed by the general law or otherwise.[9]

Another approach to the definition of a tort is to describe how it differs from a crime. Generally speaking, the differences are based on the mental attitude of the wrongdoer, the consequences of the wrong, and the redress or

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[4] PETER WARD, THE TORT CAUSE OF ACTION 12 (1974).

[5] CLARENCE MORRIS & C.ROBERT MORRIS, Jr., MORRIS ON TORTS § 1 at 1 (2nd ed. 1980).

[6] FREDERICK POLLOCK, THE LAW OF TORTS 1, (12th ed., 1929).

[7] Weadock v. Eagle Indemnity Co., 15 So.2d 132,138 (1943).

[8] T. T. Mansfield Construction Co. v. Gorsline, Tex., 292 S.W. 187,188 (1927).

[9] Glisson v. Loxley, 366 S.E.2d 68,71, 235 Va 62 (1988).

remedy provided.[10] Intention is the essence of criminal liability, but ordinarily the law of torts does not depend on intention or mental attitude of the wrongdoer.[11] A crime is considered an injury to the whole community whereas a tort is an injury to a private person.[12] Finally, a criminal proceeding is brought by the state to protect the public[13] with redress being punishment by the state[14] usually by eliminating the offender from society, either permanently or for a limited time.[15] A civil action for tort, on the other hand, is initiated and maintained by the person injured and the remedy sought is compensation to that individual for the injury[16] commonly in the form of monetary awards.[17] It should be noted that the same act may be both a crime against the state and a tort against an individual.

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[10] EDWIN JAGGARD, HANDBOOK OF THE LAW OF TORTS 8 (1895).

[11] *Id.* at 9. The notable exception is the tort of intentional interference with the person. *See generally* PROSSER, *supra* note 3, Chapter 2 (explaining components of intentional interference with the person).

[12] JAGGARD, *supra* note 10 at 10.

[13] KERN ALEXANDER, SCHOOL LAW 689 (1980).

[14] JAGGARD, *supra* note 10 at 11.

[15] PROSSER, *supra* note 3, § 2 at 7.

[16] JAGGARD, *supra* note 10 at 11, ALEXANDER, *supra* note 13 at 689.

[17] PROSSER, *supra* note 3, § 2 at 7.

In such a case there may be both a civil tort action and a criminal prosecution for the same offense.[18]

A final method of distinguishing the law of torts from other areas of law is to consider the function and purpose of this branch of law. The law of torts is concerned with allocation of losses arising out of human activity.[19] One basic axiom proposed for this allocation is "A loss should lie where it has happened to fall unless some affirmative public good will result from shifting it."[20] However, that a loss has been suffered by the plainfiff is no reason, in and of itself, to take money from the defendant.[21] In fact, a large part of a tort opinion is the attempt to strike a reasonable balance between the plaintiff's claim to protection from damages and the defendant's claim to freedom of action.[22] It has been clearly stated that the "law of torts is concerned not solely with individually questionable conduct but as well with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole."[23] Marshall S. Shapo notes "Tort law is an

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[18] *Id.* at 8.

[19] *Id.* § 1 at 6.

[20] MORRIS, *supra* note 5, § 3 at 7.

[21] *Id.* at 8.

[22] PROSSER, *supra* note 3, § 1 at 6.

[23] *Id.* at 7.

important social mediator, reflecting a rough consensus of the way the legal system should respond to personal injuries which one person attributes to another.[24]

Initially the traditional torts such as trespass to lands and persons, libel and slander, conspiracy and nuisance developed fairly independently and were based on the form of writ or directions for action to specific wrongs rather than any general tort concept.[25] Gradually some flexibility was introduced as the courts showed increasing willingness to accept the argument that there is a residue of general tort from which new remedies can be formulated for either wrongs not previously encountered or newly recognized rights.[26] It has been noted:

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action where none had been recognized before.[27]

The essential elements of a tort are the existence of a legal duty owed by a defendant to a plaintiff, breach of that duty, and a causal relation between the defendant's conduct and the resulting damage to the plaintiff.[28] Ward

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[24] MARSHALL S. SHAPO, THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POWER at xi (1977).

[25] 74 AM. JUR. 2d, § 3 at 621.

[26] *Id.*

[27] PROSSER, *supra* note 3, § 1 at 3.

[28] BARRON'S LAW DICTIONARY (1984):482.

proposed that the common denominators in all torts are damages, cause, duty, and violation.[29] An additional element in some torts is that of intent.[30] The element of intent is fairly specific to the cause of action of intentional interference and as such is not common to all tort.[31]

Before proceeding with a discussion of the specific tort theory of negligence, the concept of liability in tort must be reviewed.[32] As noted previously individuals are granted by law certain personal rights with regard to conduct which others must respect.[33] The law also imposes corresponding duties and responsibilities on each individual to respect the rights of others.[34] If, by speech or conduct one fails to respect these rights, thereby damaging another, a tort has been committed and the offending party may be held liable.[35] Liability is based on conduct that is

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[29] WARD, *supra* note 4, at 13.

[30] In tort law, intent refers to an actor's desire to cause the consequences of his act or signifies that he believes that the consequences are substantially certain to result from it. RESTATEMENT (SECOND) OF TORTS, § 8A at 15.

[31] *See* e.*g*. ALEXANDER, *supra* note 13 at 690-693, PROSSER, *supra* note 3, § 8.

[32] See generally Chapter I, notes 62 to 66 and related text.

[33] ALEXANDER, *supra* note 13 at 689.

[34] *Id*.

[35] *Id*.

considered socially unreasonable and the tort-feasor is usually held liable for acting with an intention that the law treats as unjustified, or acting in a way that departs from a reasonable standard of care.[36] Broadly speaking a person is subject to liability in tort only if he has caused harm to another person, he has failed to perform his duty to protect another person dependent upon him, or something he possesses or something or someone he has control over has caused harm to another.[37] The Anglo-American law of torts creates liability only for harmful interference with the interests of others.[38] Stated another way, a person is subject to liability if their conduct is considered a legal cause of another's injury and if there is no defense applicable to their conduct.[39]

An interest is given legal protection if society recognizes a desire as being so legitimate that one who interferes with its realization will be held civilly liable.[40] Legally recognized interests are protected in varying degrees with bodily integrity, freedom, and

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[36] PROSSER, *supra* note 3, § 1 at 6.

[37] Warren A Seavey, *Principles of Torts*, 56 HARVARD L. REV. 72, 75 (1942).

[38] *Id.*

[39] RESTATEMENT (SECOND) OF TORTS, § 5 at 9.

[40] RESTATEMENT (SECOND) OF TORTS, § 1 at 3.

reputation the most highly protected.[41] In the developmental history of tort law there has been a continuous tendency to give legal recognition to interests which previously were afforded no protection at all. "It is altogether *unlikely that this tendency* to give protection to hitherto unprotected interests and to extend a greater protection to those now infrequently protected *has ceased*."[42]

Educational Malpractice

Classification of Cases

It has been generally accepted that there are two broad categories of cases alleging educational malpractice. The first category involves a failure to adequately educate a student in basic academic skills[43] and claims negligence in the instructional *process* of the education system.[44] These cases, alleging failure to properly teach, have also been labeled "pure" educational malpractice.[45]

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[41] Seavey, *supra* note 37 at 81.

[42] RESTATEMENT (SECOND) OF TORTS, § 1 at 3 (emphasis added).

[43] Michael A. Magone, *Educational Malpractice - Does the Cause of Action Exist?* 49 MONT. L. REV. 140 (1988), Catherine D. McBride, *Educational Malpractice:Judicial Recognition of a Limited Duty of Educators Toward Individual Students* 1990 U. ILL. L. REV. 475, 476 (1990).

[44] Julie U. O'Hara, *COMMENTARY: The Fate of Educational Malpractice* 14 ED LAW REPORTER 887 (1984), Eugene R. Butler, *Educational Malpractice Update*, 14 CAPITAL UNIV. L. REV. 609, 613 (1985).

[45] JOHN COLLIS, EDUCATIONAL MALPRACTICE (1990).

The second category of cases deals with negligence in educational evaluation and centers on failure in the proper diagnosis, classification, and placement of students, usually in special education programs.[46] Placement cases commonly deal with nonteaching personnel[47] and have been classified as "hybrid" cases.[48] In supporting recognition of a limited duty of educators, several commentators have noted that the policy arguments used by the courts in denial of a general educational malpractice action are not persuasive in cases of misclassification or misplacement of children with special education needs.[49] In fact, in the only case that was ruled in favor of the plaintiff, the Supreme Court of Montana reversed the trial court and held "[t]he State has a duty to use due care in placing students in special education programs."[50] It should be noted that the Court in *Snow v. State* also found for the plaintiff, but held that the malpractice "[w]as not one of educational

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[46] Magone, *supra* note 43, McBride, *supra* note 43, Butler, *supra* note 44.

[47] O'Hara, *supra* note 44.

[48] COLLIS, *supra* note 45 at 137.

[49] McBride, *supra* note 43 at 479, O'Hara, *supra* note 44 at 895, Butler *supra* note 44.

[50] B.M. v. State, 649 P.2d 425, 426 (Mont. 1982) (claim that child was misplaced into a special education program).

malpractice, but rather medical malpractice."[51]

Frequently there is no distinction made between the two types of cases. Rationale used by the courts in cases alleging instructional negligence may be adopted by courts considering cases alleging placement negligence and vice versa. For example the 1976 landmark case of *Peter W. v. San Francisco Unified School District,*[52] an instructional case, has been followed in multiple actions based on improper evaluation and placement of students.[53] A Circuit Court in Maryland noted a distinction between instructional and placement malpractice,[54] but did not apply that

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[51] 469 N.Y.S.2d 959 (A.D.2 Dept.1983) (The three year old hearing impared Snow was initially diagnosed as having an I.Q. of 24 and placed in a treatment facility for the mentally retarded. Despite discovering he was deaf and observations by his teachers that he seemed more intelligent than the test score indicated, he was not re-tested until he was nine.) For discussion of this and other cases alleging educational malpractice that courts have recharacterized as medical malpractice and vice versa, *see generally* Laurie S. Jamieson, *Educational Malpractice: A Lesson in Professional Accountability* 32 BOSTON COLLEGE L. REV. 899, notes 319 to 340 and related text (1991).

[52] 60 Cal.App.3d 814, 131 Cal.Rptr.854 (1976).

[53] *See* e.*g.*, Smith v. Alameda County Social Services Agency, 90 Cal. App. 3d 929, 153 Cal. Rptr. 712 (1979) (claimed plaintiff had been negligently placed in a class for the mentally retarded).

[54] Doe v. Board of Education of Maryland, 295 Md. 67, 453 A.2d 814 (1982). "What we have here is not a claim for malpractice in the *treatment* of young Doe, but a claim that public employees improperly *evaluated* him for the school system and that the Board improperly *placed* him within the school system as a result of such evaluation." (emphasis added) *Id.*, 453 A.2d at 817.

distinction, following instead *Hoffman*[55] and *Hunter*[56] which were placement cases. However, the holdings in those two cases had been based on the instructional cases of *Peter W.*[57] and *Donohue*.[58]

Clear distinction between the "pure" instructional cases and the "hybrid" placement cases is made more difficult by the fact that even though classified as one or the other, many of the leading cases actually had complaints alleging placement and instructional negligence. In *Peter W.*,[59] described as the first "pure" case[60] the first cause of action charged the defendant school district, its agents and employees had "[n]egligently and carelessly failed to provide plaintiff with adequate instruction, guidence, counseling and/or supervision in basic academic skills".[61] However, in subsections the defendants were alleged to have, among other things "(1) failed to apprehend his reading

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[55] Hoffman v. Board of Education, 49 N.Y.2d 121, 400 N.E.2d 317, 418 N.Y.S.2d 375 (1979).

[56] Hunter v. Board of Education, 292 Md. 481, 439 A.2d 582 (1982).

[57] Peter W. v. San Francisco Unified School District, 60 Cal.App.3d 814, 131 Cal.Rptr.854 (1976).

[58] Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 391 N.E.2d 1352, 424 N.Y.S.2d 376 (1979).

[59] *Supra* note 57.

[60] COLLIS, *supra* note 45 at 79.

[61] 60 Cal.App.3d 817, 818, 131 Cal.Rptr. 854, 856 (1976).

disabilities, and (2) assigned him to classes in which he could not read 'the books and other materials'".[62] Similarily, in *Donohue*[63] the plaintiff complained that his inability to comprehend written English on other than a rudimentary level was due to failure on the part of the defendant "[t]o perform its duties and obligations to educate" the plaintiff,[64] but cited failure to properly evaluate the plaintiff's mental ability and capacity to comprehend subjects being taught as part of the duty of care.[65] *D.S.W. v. Fairbanks North Star Borough School District*[66] combined the actions of D.S.W. and L.A.H.. These plaintiffs complained that initially their dyslexia was not identified by the defendant school district. Further, the plainfiffs contended that after providing special education courses for a period of time, the school district negligently discontinued instructional assistance despite awareness that the dyslexia had not been over come.[67] Justice Matthews made no distinction between instructional and placement cases stating "These cases present the

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[62] *Id.*

[63] *Supra* note 58.

[64] 47 N.Y.2d 440, 442, 418 N.Y.S.2d 375, 376 (1979).

[65] *Id.*, 418 N.Y.S.2d at 377.

[66] 628 P.2d 554 (1981).

[67] *Id.* at 554-555.

question of whether an action for damages may be maintained...for the negligent classification, placement, or teaching of a student."[68]

Legal Theories for Recovery

Several legal theories in tort have been advanced in attempting to establish a cause of action for educational malpractice. These include misrepresentation, breach of contract, statutory or constitutional breach, and negligence. The theory of negligence is the major basis for the current study and is discussed in detail in subsequent sections. The theories of misrepresentation, breach of contract, and statutory or constitutional breach will be discussed briefly.

Misrepresentation

It has been argued that by inaccurately representing a student's competence and educational progress to the student, parents and others, the school district or individual teachers should be liable in damages for misrepresentation.[69] The causes of action suggested are intentional misrepresentation and negligent or fraudulent misrepresentation. As outlined in *Prosser and Keeton on*

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[68] 628 P.2d at 554.

[69] Richard Funston, *Educational Malpractice: A Cause Of Action In Search Of A Theory,* 18 SAN DIEGO L.R. 743, 763 (1981), Karen H. Calavenna, *Comment: Educational Malpractice,* 64 U. DET. L. REV. 717, 725 (1987), Nancy L. Woods, *Educational Malfeasance: A New Cause Of Action For Failure To Educate?* 14 TULSA L.J. 383, 401 (1978).

Torts, the tort action for damages is based on the cause of action in deceit and has the following elements:[70]

1. False representation of fact made by the defendant.

2. Knowledge or belief on the part of the defendant that the representation is false or that he does not have sufficient information to make the statement.

3. An intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation.

4. Justifiable reliance upon the representation on the part of the plaintiff, in taking or refraining from action.

5. Damage to the plaintiff as a result of the reliance.

While there are several types of recovery for misrepresentation, the outstanding distinction for the tort action of deceit is the requirement of knowledge of falsity of the statement and the intention to mislead.[71] Several commentators have noted that situations of intentional misrepresentation in education are likely to be extremely rare and the required proof of intent to deceive would be difficult.[72] Additionally, if there is an honest belief, however unreasonable that belief may be, that the representation is true and there is adequate information to

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[70] PROSSER, *supra* note 3, § 105 at 728.

[71] *Id.*, RESTATEMENT (SECOND) OF TORTS, § 526.

[72] Funston, *supra* note 69 at 765, Kimberly A. Wilkins, *Educational Malpractice: A Cause Of Action In Need Of A Call To Action* 22 VAL. U. L. REV. 427, 449 (1988), Joan Blackburn, *Educational Malpractice: When Can Johnny Sue?* 7 FORDHAM URB. L.J. 117, 132 (1978).

justify it, then an action in deceit will be defeated.[73] A representation made with an honest belief in its truth may still be negligent because of lack of reasonable care in ascertaining the facts or absence of the skill and competence required by a particular profession.[74]

Situations exist where the nature of the activity or a pre-existing relationship will constitute the basis for imposition of a duty to exercise reasonable care.[75] The special relationship between educators and parents may create a justifiable reliance by students and parents on the information provided.[76] Some states have statutes requiring schools to keep parents informed of the educational progress of their children.[77] It has been suggested that these statutes may create the necessary duty to provide accurate evaluations.[78] However, it must be noted that most, if not all, of these statutory requirements would only apply to K-12 public education. The Family Educational Rights and Privacy Act of 1974, more popularly known as the Buckley

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[73] PROSSER, *supra* note 3, § 107 at 742.

[74] *Id.* at 745.

[75] PROSSER, *supra* note 3, § 107 at 746.

[76] Blackburn, *supra* note 72 at 134, Calavenna, *supra* note 69 at 783.

[77] *See e.g.* IND. CODE ANN. § 20-10.1-16-7 (Burns 1996)

[78] Funston, *supra* note 69 at 764, *COMMENT: Educational Malpractice,* 124 U. PA. L. R. 783 (1976).

Amendment[79] generally requires confidential handling of student information except on request of a parent. At the postsecondary level information such as current academic status and grade point average may be released on request to parents of students defined as dependents. For release of such information on non-dependent students, there must be a court order or written permission from the student.[80] Misrepresentation in the context of private education is commonly combined with an action for breach of contract and will be discussed in a subsequent section.

Both negligent misrepresentation and intentional misrepresentation were alleged in *Peter W.*.[81] The court relied on the public policy reasonings in refusing to recognize a cause of action in negligent misrepresentation.[82] The court also dismissed the intentional misrepresentation allegation because the plaintiff showed no facts in support of the requisite element of reliance.[83]

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[79] 20 U.S.C.A., § 1232g, (Cum.Supp.1976).

[80] *See generally*, KERN ALEXANDER & M. DAVID ALEXANDER, THE LAW OF SCHOOLS, STUDENTS, AND TEACHERS 236-241 (1984).

[81] 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976).

[82] *Id.* at 828, 131 Cal.Rptr. at 862.

[83] *Id.*

Breach of contract

Another approach taken in attempt to bring an action in educational malpractice is based in contract law.[84] In order to successfully develop this argument the plaintiff contends that there is a contract, either express or implied, between the teacher and the student, the institution and the student, or the school district and the student. Generally action based on breach of contract has been used more often in the private school context and in higher education,[85] but may also be applicable in the public K-12 setting.

The *Restatement (Second) of Contracts* defines a contract as "[A] promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[86] A promise is evidence of an intention to act or refrain from acting in a specified way[87] and may be stated in words, either oral or

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[84] *See generally* Jamieson, *supra* note 51 at 922-929, *COMMENT: Educational Malpractice, supra* note 78 at 784-789, Funston, *supra* note 69 at 759-766, Wilkins, *supra* note 72 at 446-448.

[85] *See* Aumbrun v. University of Southern California, 25 Cal. App.3d 1, 100 Cal. Rptr. 499 (1972). *See also infra* notes 110 to 113 and related text.

[86] RESTATEMENT (SECOND) OF CONTRACTS, § 1 at 5.

[87] *Id.* § 2 at 8.

written or may be inferred wholly or partly from conduct.[88] The essential elements of a contract are (1) the making of an offer, (2) consideration of the offer, and (3) acceptance of the offer.[89]

An offer is essentially the same as a promise[90] and indicates willingness to enter into a bargain.[91] Several kinds of expressions may border on, but are not considered promises.[92] Of particular importance in the educational context is the expression of opinion. An expression of opinion is not a promise and therefore is not an offer.[93] This distinction has also been crucial in the doctor-patient relationship.[94] Generally a doctor is not held liable in contract for a breach of an implied promise to possess the standard of skill possessed by his colleagues.[95] However,

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[88] *Id.* § 4 at 14. There is no difference in the legal effect of express or implied contracts. *Id.*

[89] RESTATEMENT (SECOND) OF CONTRACTS, § 24, § 50, § 71.

[90] JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 31, § 2-5 (3rd ed. 1987). A differentiation between offer and promise is made in the RESTATEMENT (SECOND) OF CONTRACTS, § 24 at 72, noting an offer of a performance in exchange for either a return promise or return performance is not necessarily a promise.

[91] RESTATEMENT (SECOND) OF CONTRACTS, § 24 at 71.

[92] See *generally* CALAMARI & PERILLO, *supra* note 90, § 2-6.

[93] *Id.* at 33.

[94] *Id.*

[95] *Id.* (citations omitted)

where a physician has entered into an express contract, courts have recognized liability for breach of promise to cure,[96] or obtain a specified result,[97] or administer a prescribed treatment.[98]

In reversing the lower court's decision, the Appellate Division on *Paladino v. Adelphi University*[99] held that no recovery could lie for breach of contract based on "[a]lleged failure to provide a quality education to a student enrolled in the school."[100] It was noted in dicta, "[I]f the contract with the school were to provide for certain specified services . . . a contract action with appropriate consequential damages might be viable."[101] However, the asserted breach was based on the quality and adequacy of the course of instruction and statements based on the quality of education to be provided "[a]re not statements of fact capable of proof, but rather *opinions*

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[96] Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929).

[97] Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973).

[98] Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957).

[99] 454 N.Y.S.2d 868 (1982).

[100] *Id.* at 870.

[101] *Id.* at 873.

which ought not provide a basis for the imposition of liability."[102]

Another element of a contract is acceptance of the offer. Once it is established that an offer has been made, it follows that the offer invites acceptance.[103] Unless otherwise indicated by the specific language of the offer, acceptance may be in any manner and by any medium reasonable in the circumstances.[104] Acceptance of an offer is a manifestation of agreement to the terms made by the offeree.[105]

In addition to the elements of offer and acceptance, there is the requirement of consideration. To constitute consideration, a performance or a return promise must be bargained for.[106] A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.[107] Consideration for the promise of non-negligent teaching might be deemed fulfilled when a student

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[102] *Id.* at 874 (emphasis added). This statement was made in response to the claim of misrepresentation of the terms of the contract.

[103] CALAMARI & PERILLO, *supra* note 90 at 32.

[104] RESTATEMENT (SECOND) OF CONTRACTS, § 30 at 85.

[105] *Id.* § 50 at 128.

[106] *Id.* § 71 at 172.

[107] *Id.*

does not seek education elsewhere.[108] In K-12 public school, the weakness of the contractual theory is the lack of a "bargained-for-exchange" since attendance is required by law[109] and consideration is only inferred. In the private school context, tuition relieves the court from inferring consideration.[110]

The contractural relationship between students and their higher education institutions has been well established.[111] Hall noted "[P]resent-day courts consistently view the relationship between students and their colleges or universities as contractural with additional constitutional protections required if the institution is public."[112] The terms of the contract are stated or implied in the circulars, handbooks, bulletins,

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[108] *COMMENT: Educational Malpractice, supra* note 78 at 784-785.

[109] *Id.*, Wilkins, *supra* note 72 at 447, Funston, *supra* note 69 at 760.

[110] Alice J. Klein, *NOTES, Educational Malpractice: Can The Judiciary Remedy The Growing Problem of Functional Illiteracy?* 13 SUFFOLK U.L. REV. 27, 31 (1979).

[111] *See generally* Rosa E. Hall, The Evolution of The Contractual Relationship Between American Students And Their Colleges or Universities (unpublished Ph.D. dissertation, University of Florida, 1988), Jonathan Flagg Buchter, *Contract Law and the Student-University Relationship* 48 IND. L.J. 253 (1973), Eileen K. Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?* 7 J.C.& U.L. 191 (1981).

[112] Hall, *supra* note 111 at 384.

catalogs, and regulations made available to students at enrollment.[113]

As noted by several legal scholars, in a suit alleging failure to learn due to teacher negligence, a contract approach may have several advantages over a tort approach.[114] First, defenses such as contributory negligence or assumption of risk that bar recovery in tort do not bar recovery in contract. Second, governmental immunity is less likely to preclude recovey in contract. Third, statutes of limitations are generally longer in contract than in tort. The fourth advantage is somewhat speculative in that the courts may be more willing to allow recovery for loss of an expectancy or benefit in contract because damage awards would be limited to the amount of benefit denied by the teacher, such as cost of remedial instruction, rather than a broader amount such as loss of future earnings.[115]

As previously mentioned a disadvantage of the contract approach is reliance on implied components of an implied contract. Another problem is the commonly held position

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[113] *Id.* at 384-385. *See* Robert L. Cherry, Jr. & John P. Geary, *The College Catalog As A Contract* 21 J. LAW & EDUCATION 1 (1992), Zumbrun v. University of Southern California, 25 Cal. App.3d 1, 100 Cal. Rptr. 499 (1972), Lowenthol v. Vanderbuilt University, No. A-8525 (Davidson County, Tenn. Ch. Ct., Memorandum Opinion (1976).

[114] *COMMENT: Educational Malpractice, supra* note 78 at 788, Funston, *supra* note 69 at 759-760.

[115] Funston, *supra* note 69, note 66.

that where a governmental agency contracts to benefit the entire community, individuals do not have a right to enforce that contract.[116] Thus "[e]ven were there an implied contract between the school district and its taxpayers, it is a contract intended to benefit the entire community and not one on which the district intended to be liable to the third party beneficiaries of the contract", that is the individual student.[117] A major disadvantage is the fact that terms of a contract may be unenforcable on the grounds of public policy.[118] "A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation relevant to such a policy, or (b) the need to protect some aspect of the public welfare. . . ."[119] Since there is rarely specific legislation, based on public policy, that designates a term unenforceable, the court usually reaches that decision based on their own perception of the need to protect some aspect of the public welfare.[120]

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[116] *See* Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928) (a member of the public may not maintain an action against a party that contracts with the city to furnish water to the fire hydrants, in the absence of an apparent intention on the part of the promisor to be liable to individual members of the public as well as to the city for any loss resulting from a breach of the contract).

[117] Funston, *supra* note 69 at 762.

[118] *See generally* RESTATEMENT (SECOND) OF CONTRACTS, § 178-179.

[119] *Id.*, § 179 at 15.

[120] *Id.*, comment a.

A final defect in the contract-based approach to educational malpractice is that the law of contracts has historically been much less flexible and willing to recognize novel causes of action.[121]

Constitutional and statutory rights

If the violation of a federal constitutional right could be found, educators would be liable under the Civil Rights Act of 1979, 42 U.S.C. § 1983.[122] A major obstacle to this approach is the fact that the United States Supreme Court has held that there is no fundamental constitutional right to an education.[123] Although some state courts have found that a right to education is established by their

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[121] Funston, *supra* note 69 at 763, *COMMENT: Educational Malpractice*, *supra* note 78 at 788.

[122] 42 U.S.C. § 1983 (1988) states:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in as action at law, suit in equity, or other proper proceeding for redress. . . .

The scope of liability of public entities and public officials under § 1983 has been greatly expanded in recent years and has been extended to school officials. *See e.g.* Wood v. Strickland, 420 U.S. 308 (1977).

[123] San Antonio Independant School Dist. v. Rodriquez, 411 U.S. 1, 35 (1973).

state constitutions, this does not affect liability under 42 U.S.C. § 1983.[124]

With the adoption of the Education for All Handicapped Children Act of 1975 (EAHCA),[125] there was conjecture that a federal statutory basis for educational malpractice had been created.[126] This hope was quickly dispelled by a series of cases that noted the EAHCA did not contain any implied private cause of action for damages.[127] Cases alleging violation of state statutes for education of exceptional children have met with similar judicial disfavor.[128]

An alternative cause of action that has been discussed is based on the U.S. Constitution's Fourteenth Amendment's equal protection and due process clauses.[129] Denial of equal protection may be argued in conjunction with allegations concerning handicapped education statutes, but has usually

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[124] *E.g.* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977).

[125] 20 U.S.C. §§ 1400 to 1454 (1982).

[126] Butler, *supra* note 44 at 623, COLLIS, *supra* note 45 at 71.

[127] *E.g.* Loughran v. Flanders, 470 F. Supp. 110 (1979).

[128] *See* e.*g.* Lindsay v. Thomas, 465 A.2d 122 (Pa. Comwlth. 1983); B.M. v. State, 649 P.2d 425 (Mont. 1982); D.S.W. v. Fairbanks North Star Borough School District, 628 P.2d 554 (1981).

[129] Funston, *supra* note 69 at 768-770, Woods, *supra* note 69 at 402-403, Wilkins, *supra* note 72 at 451-454.

been held to be without merit.[130] Using the due process clause, students attending school under compulsory attendance laws are compared to involuntarily confined mental institution patients.[131] The analogy contends that the enforced confinement of public school students amounts to a deprivation of liberty without due process of law, unless appropriate, non-negligent instruction is provided.[132] The unconstitutional confinement argument was discussed in *In re Gregory B.*,[133] but the court found the analogy to "right to treatment" cases to be "improbable".[134] Problems associated with this line of reasoning include the fact that students, unlike patients, are confined for only a fraction of the school day. Additionally, in the "right to treatment" cases it was established that the plaintiffs were receiving no treatment. As Funston so poignantly stated "Even in the most inadequate school districts...students

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[130] *See e.g.* Jack M. v. School Board of Santa Rosa County, U.S. Dist. Ct. for the Northern District of Florida, Pensacola Division, No. PCA 79-0050 (1980); B.M. v. State, 649 P.2d 425 (Mont. 1982).

[131] Funston, *supra* note 69 at 768, Wilkins, *supra* note 72 at 452. The leading cases dealing with involuntarily confined mental patients are Donaldson v. O'Connor, 493 F.2d 507 I5th Cir. 1974), *vacated* 422 U.S. 563 (1975), and Youngverg v. Romeo, 457 U.S. 307 (1982).

[132] Funston, *supra* note 69 at 768.

[133] 88 Misc. 2d 313, 387 N.Y.S.2d 380 (Fam. Ct. 1976).

[134] *Id.* at 316, 387 N.Y.S.2d at 383.

receive *some* education."[135] Finally, analogy of the treatment cases to education presents a problem in the formulation of standards. Terms such as "custodial care" and "treatment" have definite meanings in the field of mental health and fulfilling a patient's right to treatment is accomplished by following specific procedures.[136] Many have argued that no such clarity of terms or procedures is found in education.[137]

Theory of negligence

Although actions based on breach of contract, misrepresentation, and breach of constitutional rights have been proposed by some plaintiffs, many writers agree the theory of negligence holds the most promise for a cause of action in educational malpractice.[138] In an action for negligence, the plaintiff has the burden of proving

(a) facts which give use to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,

(b) failure of the defendant to conform to the standard of conduct,

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[135] Funston, *supra* note 69 at 769.

[136] *Id.* at 770.

[137] *Id.*

[138] Calavenna, *supra* note 69 at 726, Wilkins, *supra* note 72 at 458, *COMMENT: Educational Malpractice, supra* note 78 at 804, Butler, *supra* note 44 at 628.

(c) that such failure is a legal cause of the harm suffered by the plaintiff, and

(d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.[139]

Phrased another way the basic elements are (1) a duty owed, (2) a breach of the duty, (3) a causal realtionship,[140] and (4) actual loss or damage.[141] Each of these elements will be discussed separately with emphasis on application in the area of educational malpractice.

Negligence began to develop as a separate tort in the early part of the nineteenth century.[142] As accidents caused by industrial machinery increased, so did the recognition of negligence.[143] The potential impact of changing technologies was recognized by early writers when they stated:

> In determining what constitutes negligence, regard is to be had to the growth of science . . . which takes place from generation to generation; and many acts or ommissions are now evidence of gross carelessness, which a few years ago would not have been culpable at

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[139] RESTATEMENT (SECOND) OF TORTS, § 328A at 149.

[140] Legal cause is comprised of two components: cause in fact and proximate cause.

[141] PROSSER, *supra* note 3, § 30 at 164-165.

[142] Percy H. Winfield, *The History Of Negligence In The Law Of Torts* 42 LAW QUARTERLY REV. 184, 185 (1926), PROSSER, *supra* note 3, § 28 at 160.

[143] *Id.*

> all, as many acts are now consistent with great care and skill, which in a few years will be considered the height of imprudence.[144]

A prime example of technological impact has been in the arena of medical malpractice in prenatal injury cases of "wrongful birth",[145] "wrongful life",[146] and "wrongful death".[147]

Duty

A duty is an obligation to conform to a particular standard of conduct toward another.[148] Before the emergence of negligence as a separate tort, the duty to take care was taken for granted and only the extent of duty was in question.[149] However, as the theory of negligence developed in both English and American law, the need for proof of duty, rather than an implied duty, became more prevalent. The precedent followed by today's courts is that there can be no recovery in negligence unless there is a legally

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[144] THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 5-6 § 7 (2nd ed. 1869).

[145] Generally considered a parent's right of action. *See e.g.* Garrison v. Medical Center of Delaware, Inc., 581 A.2d 288 (Del. Supp. 1989), Phillips v. U.S., 566 F. Supp. 1 (1981).

[146] A child's right of action in prenatal injuries. *See generally* 62A AM. JUR. 2d, §§ 89-180.

[147] Actions for prenatal injury to decedent. *See generally* 62A AM. JUR. 2d, §§ 38-88.

[148] PROSSER, *supra* note 3, § 53 at 356.

[149] Percy H. Winfield, *Duty In Tortious Negligence*, 34 COLUM. L. REV. 41, 45 (1934).

imposed duty of care upon the defendant.[150] As Prosser notes there is no universal test for establishing a duty and its character is artificial at best.[151] The essential question is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.[152]

For an educator to be held liable in a suit alleging negligent teaching, the plaintiff would first have to successfully prove that the defendant had a legal duty to provide competent instruction.[153] The two possible origins of this duty that have been proposed by legal scholars are common law principles and statutory enactments.[154] To date, there is no direct precedent for a common law duty, but three common law principles discussed as possible sources are the theory of undertaking, the duty of care for physical safety, and professional negligence.

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[150] Palsgraf v. Long Island Railroad Company (248 N.Y. 339, 162 N.E. 99, 1928).

[151] PROSSER, *supra* note 3, § 53 at 357-358.

[152] *Id.* at 357.

[153] *See generally* Destin S. Tracy, *Comment: Educational Negligence: A Students' Cause of Action For Incompetent Academic Instruction* 58 N.C.L. REV. 561, 564-572 (1980), Woods, *supra* note 69 at 393-396, Blackburn, *supra* note 72 at 118-130, John Elson, *A Common Law Remedy For The Harms Caused By Incompetent Or Careless Teaching*, 73 NW. U. L. REV. 641, 693-697 (1978), *COMMENT: Educational Malpractice, supra* note 78 at 767-781.

[154] Funston, *supra* note 69 at 772, Calavenna, *supra* note 69 at 726, Tracy, *supra* note 153 at 565.

The theory of undertaking relies on the common law of rescue. Broadly stated when one undertakes to render a service to another upon which the other relies, the actor will be liable for any harm that results from negligent performance.[155] As Funston notes "The uneducated child is like a potential victim in need of rescue. When the schools undertake the attempt to educate this child, though they need not succeed, they do assume a duty to make the attempt non-negligently."[156] The central issue is one of reliance on the affirmative action of the rescuer. The analogy drawn is that the student is dependent on the individual skills and information provided by the instructors.[157] Arguably additional reliance is placed in the educational institution from a public consensus that education is beneficial to both the individual and society.[158]

No legal requirement exists to undertake a rescue - the action must be voluntary.[159] A problem in trying to establish duty through the theory of undertaking is that education is not voluntary, it is mandatory. The greater problem is the fact that the courts have been reluctant to

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[155] PROSSER, *supra* note 3, § 56 at 378-382, RESTATEMENT (SECOND) OF TORTS, § 323.

[156] *Supra* note 69 at 772.

[157] Wilkins, *supra* note 72 at 455.

[158] SHAPO, *supra* note 24 at 150.

[159] PROSSER, *supra* note 3, § 56 at 375-377.

apply the undertaking theory where the undertaking in question was the provision of some broad social service.[160]

The duty of care for the physical safety of students is well established for educators and institutions at all levels.[161] The vast majority of suits filed against teachers involve some aspect of negligent supervision.[162] The degree of supervision required varies with the age of the students, the level of instruction, and the potential risk of harm.[163] Teachers have also been held to a duty to provide students with adequate and appropriate instruction prior to beginning an activity that poses a risk of harm,[164] but liability is not usually imposed on school personnel if students willfully disregard instructions.[165] The student alleging

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[160] Funston, *supra* note 69 at 773, Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928) (suit against the water company for negligent failure to provide adequate water to extinguish a fire before it destroyed plaintiff's warehouse was held not maintainable as an action for a common law tort. Judge Cardozo characterized the failure to supply adequate water as a denial of a benefit not the commission of a wrong.)

[161] *See generally* RICHARD D. STRAHAN & L. CHARLES TURNER, THE COURTS AND THE SCHOOLS 159-164 (1987), MARTHA M. McCARTHY & NELDA H. CAMBRON-McCABE, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 452 (3rd ed., 1992), RENNARD STRICKLAND, ET AL., AVOIDING TEACHER MALPRACTICE: A PRACTICAL HANDBOOK FOR THE TEACHING PROFESSIONAL 51-61 (1976), Funston, *supra* note 69 at note 20, Tracy, *supra* note 153 at 566.

[162] STRAHAN & TURNER, *supra* note 161 at 160.

[163] *Id.*

[164] McCARTHY & CAMBRON-McCABE, *supra* note 161 at 459.

[165] *Id.* at 460.

academic harm might argue that there is no difference from physical harms caused by improper instruction and supervision. It has been claimed that preventing failure of a student to learn is no less important than preventing physical injuries.[166] While the foreseeable nature of injury in both instances might support the analogy, the standard of conduct imposed is different and has been the major argument against the use of this common law principle.[167] The duty to act non-negligently in caring for the physical safety of students is based on the reasonable person standard, but the educational malpractice plaintiff is seeking to hold educators to a higher professional or "reasonable teacher" standard.[168] Thus, creation of a duty in educational malpractice based on duty of care in physical injury case law may be unsuccessful.

Of the three common law principles proposed, analogy to professional negligence provides the strongest argument for legal recognition of duty to provide competent academic instruction.[169] Attributes common to actions for

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[166] *COMMENT: Educational Malpractice, supra* note 78 at 773. Recovery for non-physical injuries has been permitted in other areas of tort law such as defamation, invasion of privacy, and mental distress.

[167] Tracy, *supra* note 153 at 566, Funston, *supra* note 69 at 773.

[168] *Id.* See also *infra* notes 185 to 200 and accompanying text for full discussion of the various standards of care.

[169] Tracy, *supra* note 153 at 567.

professional negligence include the defendant's obligation incurred from a contract to provide a service and a specific standard of care to which the defendant is held. Additionally, a judgment against the defendant may be very harmful to his/her reputation.[170] A professional is one who undertakes any work calling for specialized skill and who is required to possess a standard minimum of special knowledge and ability.[171]

Unfortunately, problems are also associated with creating the professional negligence analogy. First, educators must be recognized as professionals. Although educators may consider themselves professionals, self-characterization by an occupational group does not constitute legal recognition as such.[172] While some state statutes expressly recognize educators as professionals,[173] and some courts have referred to educators as professionals,[174] the designation in itself is not enough.

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[170] THOMAS G. ROADY, Jr. & WILLIAM R. ANDERSEN, PROFESSIONAL NEGLIGENCE vi-vii (1960).

[171] PROSSER, *supra* note 3, § 32 at 185.

[172] Funston, *supra* note 69 at 774. The author goes on to question somewhat sarcastically "Could physicians escape professional liability if the American Medical Association were to unilaterally reclassify medicine as a trade?"

[173] *See e.g.*, ALA. CODE § 16-23-16.1 (1995),GA. CODE ANN. § 20-2-791 (1996), W. VA. CODE § 18A-1-1 (1997).

[174] Hunter v. Board of Education, 439 A.2d 582, 589 (1982) (Davidson, J., concurring in part dissenting in part), Donohue v. Copiague Union Free School District, 47 N.Y.2d

The professional usually relies on status and reputation to determine earning capacity.[175] Second, educators are commonly employed under contractural agreements with institutions or systems and not with the individuals to whom services are being rendered. Finally, there is the question of educators possessing certain skills and specialized knowledge. Some believe that educators may meet this criteria in specific content areas rather than in the broad area of education.[176] Others have concluded not only do educators fulfill the specialized skill and knowledge criteria, but the general public expects them to perform accordingly.[177]

Statutorily imposed obligations are a final area to be considered as potentially creating the element of duty necessary to recover damages in negligence. Sources of statutory duty may be (1) provisions in state constitutions and other legislative enactments providing for the creation and maintenance of public school systems, and (2) statutes or regulations requiring specific actions in defined situations particularly those involving students with

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Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 443, 418 N.Y.S.2d 375, 377 (1979).

[175] Funston, *supra* note 69 at 775.

[176] *Id.* at 774-775.

[177] Tracy, *supra* note 153 at 568.

identifiable learning problems.[178] It has been proposed that state statutes reflect public policy attitudes that school districts should be held responsible for their actions.[179] Duty of care imposed by statute should not be confused with liability based on violation of constitutional or statutory rights.[180]

The primary problem with a statutorily created duty is that of legislative intent. In many cases the evident policy of the legislature was to protect only a limited class of individuals and that the harm suffered must be of the kind the statute intended to prevent.[181] Provisions related to creation and maintenance of public school systems are generally seen as conferring the benefit of education on the general public and are not intended to protect individual students from the harm caused by negligent

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[178] *Id.* at 569, citations omitted.

[179] Woods, *supra* note 69 at 395.

[180] See discussion *supra* notes 122 to 137 and accompanying text.

[181] PROSSER, *supra* note 3, § 36 at 224-225. Gorris v. Scott, L.R. 9 Ex. 125 (1874) (Sheep carried on the deck of a ship were washed overboard and lost. Plaintiff sued carrier seeking to establish negligence based on Contagious Disease Act which carried criminal penalties for transporting sheep without supplying pens and footholds. Court held for carrier on the ground that injuries were not of the type the statute was designed to prevent.) Noted in MORRIS, *supra* note 5, § 5 at 167.

instruction.[102] An individual may, however, maintain an action in tort on the basis of statutory violation if he suffers a harm distinct from that suffered by the rest of the community.[103] The harm suffered by the student alleging negligent instruction is quite different from that suffered by the general community.[104]

Standard of care

The second major element of a cause of action based on negligence is a failure on the defendant's part to conform to the standard required: a breach of the duty.[105] A legal standard of conduct can either be that of the reasonable person[106] or a statutory standard of conduct.[107] The qualities and attributes of the reasonable person differ in

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[102] Funston, *supra* note 69 at 777, *contra* see *COMMENT: Educational Malpractice, supra* note 78 at 780 (statutory duty is imposed if the person injured is a member of the class for whose benefit the statute was enacted and the injury is of a type intended to prevent). It should be noted that in states where statutory wording includes provision of "adequate" educational services or opportunity, there is a growing body of case law particularly related to "adequacy" in funding.

[103] RESTATEMENT (SECOND) OF TORTS, § 288, comment on clause (b).

[104] *COMMENT: Educational Malpractice, supra* note 78 at 780-781.

[105] PROSSER, *supra* note 3, § 30 at 164.

[106] The original phrase was reasonable man, but later courts have adopted the unisex person term.

[107] PATRICK D. LYNCH, CONTEMPORARY LEGAL ISSUES IN EDUCATION 219 (M.A. McGhehey ed., 1979).

suits dealing with ordinary negligence and those dealing with professional negligence.

The standard of conduct which the community demands must be an external and objective one, applied equally to all, but sufficiently flexible to allow for the risk apparent to the actor within the circumstances under which he must act.[188] In an attempt to develop a standard the courts have created the "reasonable man of ordinary prudence" who as Prosser notes "is fictitious and has never existed on land or sea."[189]

The standard of conduct of a reasonable man may be:

a. Established by legislative enactment or administrative regulation,
b. Adopted by the court from legislation or administrative regulation which does not so provide,
c. Established by judicial decision, or
d. Applied by the facts of the case by the trial judge or jury, if there is no legislation, regulation or decision.[190]

The standard of conduct expected of the reasonable person of ordinary prudence is not a strictly objective one. Acceptable conduct may vary with the situation because negligence is based on what the reasonable person would do "under the same or similar circumstances."[191] Other components that add some subjective variance to the

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[188] PROSSER, *supra* note 3, § 32 at 173-174.

[189] *Id.*

[190] RESTATEMENT (SECOND) OF TORTS, § 285 at 20.

[191] *Id.* at 12, PROSSER, *supra* note 3, § 32 at 175.

reasonable person standard are physical attributes, mental capacity, age, and knowledge level of the actor. The physical characteristics are said to be identical with the actor, that is if the defendant is disabled in some way then the standard by which his conduct would be judged would be the reasonable person of ordinary prudence with a similar limitation.[192] Generally altered mental capacity ranging from poor judgement to more severe disabilities including total insanity does not release a person from being held to the reasonable person standard.[193]

The knowledge level of the actor presents one of the most difficult questions in connection with negligence.[194] The reasonable person standard is one of general average intelligence and actions will be judged not only on the basis of intelligence, but with knowledge of the world about them.[195] Based on what is common to the community there is a

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[192] *See generally* PROSSER, *supra* note 3, § 32 at 175-176, MORRIS, *supra* note 5, § 4 at 52, RESTATEMENT (SECOND) OF TORTS, §§ 283A-283C (describing the standards for children, mental deficiency, and physical disability).

[193] PROSSER, *supra* note 3, § 32 at 177. Rationales offered for this apparent injustice include the difficulty in distinguishing true incapacity from mere bad judgement, the belief that custodians of incompetents should be encouraged to control their charges, and the perceived sense of fairness that those with altered mental capabilities (Prosser used the term "mental defectives") who live within the rest of society should conform to the general standard of conduct. *Id.*

[194] *Id.*

[195] WILLIAM J. CURRAN, PROFESSIONAL NEGLIGENCE 2, 3 (Thomas G. Roady, Jr. and William R. Andersen eds. 1960).

minimum standard of knowledge and individuals who come into a community are expected to conform to that set of standards rather than the ones they may have been familiar with previously.[196] An individual will usually not be held to knowledge of risks which are not known or apparent to him unless he is engaged in an activity or stands in a relationship to another that imposes an obligation to find out about potential risks.[197] If educators are found to have a duty of care based on their relationship to students, then it might be reasonable to conclude the educators have an obligation to find out what instructional risks their students might face.[198] As is true of negligence in general,[199] advances in scientific knowledge must be considered. Prosser states "what was excusable ignorance yesterday becomes negligent ingorance today."[200]

Thus far this review has outlined the minimum standards of conduct required of the reasonable person of ordinary

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[196] PROSSER, *supra* note 3, § 32 at 184.

[197] *Id.* at 184-185.

[198] Psychometric testing is a standard component in evaluation of students both as individuals and as groups. While there is constant controversy on issues of reliability and validity of these tests, there is a general consensus that the various tests, taken as a whole, can provide information that the educator can use in designing learning experiences appropriate for students of varying capabilities.

[199] *Supra* note 144.

[200] PROSSER, *supra* note 3, § 32 at 185.

prudence. It is by these standards that the triers of fact will judge the acts or omissions of the everyday lay person in cases alleging ordinary negligence. If, however, a person has or holds themselves out as having knowledge, skill or intelligence superior to that of the ordinary person, then the law will demand a higher level of conduct.[201] It is this higher standard upon which professional negligence is based.

Professional Negligence

The relationship between the legally imposed duty of care and the standard of care related to that duty is readily apparent when considering professional negligence.[202] Several commentators have noted that unlike supervision for physical safety, which uses the reasonable person standard, academic instruction has no close analogy in the experience of most laymen.[203] Although potentially every judge and juror has had some experience with various educational systems from the student perspective, very few are likely to have the teacher's perspective.[204] Because of this limited knowledge level the trier of fact must rely on expert

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[201] *Id.*

[202] The judicial consideration of existence of duty and applicable standard does not proceed in two separate and distinct phases. Funston, *supra* note 56 at 139.

[203] Elson, *supra* note 153 at 701, Tracy, *supra* note 153 at 573, Funston, *supra* note 69 at 779.

[204] *Id.*

testimony regarding what teachers actually and customarily do under similar circumstances.[205]

Most legal scholars and educational commentators support holding educators to the higher professional standard because teachers hold themselves out as having special knowledge that required specific training to acquire.[206] Professionals are required to both exercise reasonable care in what they do and to possess a standard minimum of special knowledge and ability.[207] In medicine, the formula for the standard minimum is that the doctor must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing.[208] Some argue, however, that the abstract quality of education, the lack of consensus of the primary goal of education, and conflicting theories of learning make the establishment of a workable standard difficult if not impossible.[209] Lack of consensus on guidelines of practice

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[205] Elson, *supra* note 153 at 700.

[206] See for example Elson, *supra* note 153 at 700, Tracy, *supra* note 153 at 573, Theresa E. Loscalzo, *Liability for Malpractice in Education* 14 J LAW & ED 595, 604-605 (1985), *COMMENT: Educational Malpractice*, *supra* note 78 at 771.

[207] PROSSER, *supra* note 3, § 32 at 185.

[208] *Id.*

[209] Funston, *supra* note 69 at 780, Tracy, *supra* note 153 at 575, Calavenna, *supra* note 69 at 727.

is not unique to education and will be discussed in the subsequent section in relation to medical malpractice.[210]

Causation

The third major element necessary to a cause of action in negligence is the establishment of a connection between the conduct of the defendant and the injury to the plantiff.[211] Causation is based on several legal concepts, but the major two that will be discussed are "causation in fact" and "proximate cause".[212] Within those two concepts the "but-for" and "substantial-factor" rules help to determine facts and legal significance.[213] Causation is a basic determinant of tort liability for no matter what specific type of tort is being considered there must be a connection between the defendant and the plaintiff's damages.[214] The relationship between legal cause and liability in the theory of negligence has been stated as follows: In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that

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[210] See *infra* notes 334 to 337 and accompanying text.

[211] PROSSER, *supra* note 3, § 30 at 165.

[212] See *generally* PROSSER, *supra* note 3, Chapter 7 (discussing in detail proximate cause).

[213] *Id.* § 41 at 276.

[214] WARD, *supra* note 4 at 15.

the negligence of the actor be a legal cause of the other's harm.[215]

Causation in fact is based on a search for what factually caused the injury. In the simplest form, establishment of cause is limited to a factual investigation and excludes the policy considerations of remote consequences.[216] Causation in fact covers not only conduct, both acts and omissions, and active physical forces, but also pre-existing conditions which played a part in bringing about an event.[217] This is best summarized in the "but-for" or "sine qua non" rule and is stated: "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it."[218] The "but for" rule used as a rule of exclusion is useful in explaining the factual causes in a great number of cases, but it fails in one specific situation: when two causes concur to bring about an event, and either one occurring alone would have been sufficient to cause the identical result.[219] In this type of situation

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[215] RESTATEMENT (SECOND) OF TORTS, § 430 at 426.

[216] WARD, *supra* note 4 at 15.

[217] PROSSER, *supra* note 3, § 41 at 265.

[218] *Id.* at 266.

[219] *Id.*

strict application of the "but for" rule would tend to absolve each individual cause from liability on the grounds that the identical harm would have occurred without the single conduct.[220]

Determination of causation in cases with concurrent causes is based on the broader "substantial factor" rule.[221] This rule states: The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about.[222] Several considerations help determine whether negligent conduct is a substantial factor in bringing about harm to another:

> (a) additional contributing factors and the extent of their effect on producing the harm;
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
> (c) lapse of time.[223]

The mere existence of contributing factors does not relieve the actor of liability because it is commonly recognized that there are frequently a number of events that can contribute or have an appreciable effect on a single outcome. The actor's conduct is only one of the potential

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[220] *Id.* at 267.

[221] *Id.*

[222] *Id.* It should be noted that the "substantial factor" rule is also used in determining proximate cause. See MORRIS, *supra* note 5, § 7 at 174.

[223] RESTATEMENT (SECOND) OF TORTS, § 433.

causes. If one or a combination of other contributing factors have such a predominant effect in bringing about the harm that the actor's conduct becomes insignificant, then the actor's negligent conduct is no longer considered a substantial factor.[224]

Usually the actor's negligent act must be in continuous and active force up to the actual harm in order for it to be considered a substantial factor.[225] If some intervening event or contributing factor is sufficient to break the chain of events causing the injury, the original negligent act may be considered an insignificant force in the harm.[226] For instance where a student was cleaning a power saw in shop class and another student turned on the switch starting the machine in violation of safety rules, the court held that the school board's negligence in not having a guard over the beltdrive was not the proximate or legal cause of the injury.[227] The existence of intervening events, however, does not necessarily relieve an actor of liability for negligent conduct.[228] If the intervening act had been

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[224] *Id.*, § 433, comment on clause (c).

[225] ALEXANDER, *supra* note 13 at 699, RESTATEMENT (SECOND) of TORTS, § 439.

[226] ALEXANDER, *supra* note 13 at 699.

[227] Meyer v. Board of Education, 9 N.J. 46, 86 A.2d 761 (1952).

[228] McCARTHY & CAMBRON-McCABE, *supra* note 161 at 455.

foreseeable and could not have been prevented by reasonable care by the defendant, then liability may still attach as a "substantial factor".[229]

When there has been a great length of time between the actor's negligent conduct and harm to another, multiple contributing factors may have intervened making the actor's conduct insignificant compared to the aggregate of other factors. No matter how long the lapse of time, if there is evidence that the influence of the actor's negligence is still a substantial factor, that conduct will still be considered the legal cause of harm. Where statutes of limitation[230] exist the lapse of time may become a decisive factor.[231] However, the trend toward the liberal interpretation of statutes of limitations has caused courts not to invoke these statutes as a bar to suits involving long-latent injuries.[232]

The burden of proof on the issue of the fact of causation is on the plaintiff. Evidence must be introduced that leads to the reasonable conclusion that it is more likely than not that the conduct of the defendant was a

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[229] ALEXANDER, *supra* note 13 at 700.

[230] *See e.g.* PROSSER, *supra* note 3, § 30 at 165-168 (discussing when the statute of limitations begins to run).

[231] RESTATEMENT (SECOND) OF TORTS, § 433, comment on clause (c).

[232] ROBERT E. LITAN, ET AL., LIABILITY PERSPECTIVES AND POLICY, 7 (Robert E. Litan & Clifford Winston eds., 1988).

cause in fact of the result.[233] The mere possibility of causation is not enough. If the conclusion is not common knowledge, expert testimony may be used to provide a basis for conclusion.[234] However, if it is a matter of ordinary experience that certain conduct might be expected to produce a particular result, that does in fact occur, then the conclusion is permissible that the causal relation exists.[235]

Even though the defendant's conduct may be established as one of the factual causes of the plaintiff's injury, there is still the question of whether the defendant should be held legally responsible for that injury.[236] The terms "proximate cause" and "legal cause" are used to denote the boundaries of liability that the courts have placed on the actor for the consequences of the actor's conduct.[237] The limitations of liability depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.[238] Policy is the expression of ideas of what justice demands or

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[233] PROSSER, *supra* note 3, § 41 at 269.

[234] *Id.* No expert testimony is required on medical matters within common knowledge.

[235] *Id.* at 270.

[236] *Id.* § 42 at 272-273.

[237] *Id.* at 264.

[238] *Id.* at 273.

what is administratively possible and convenient.[239] Summarized simply, the doctrine of proximate cause requires that the plaintiff's injury be the natural, probable, and foreseeable consequence of the defendant's conduct.[240]

Proximate cause is closely related to both duty and breach of duty. It is related to duty because both concepts deal with the issue of extent of liability. To establish proximate cause this question must be answered: Was the defendant under a duty to protect the plaintiff against the event which did in fact occur?[241] This returns to the issue of whether there exists some relationship between the defendant and plaintiff such that there is a legally recognized obligation of conduct for the plainfiff's benefit.[242] Proximate cause is related to breach of duty because both are established by the same conduct.[243]

Just as the "but for" and "substantial factor" rules are important in establishing factual causation, foreseeability is important in establishing proximate cause.

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[239] *Id.* at 264.

[240] Funston, *supra* note 69 at 789.

[241] *Id.* Stated differently it has been noted "To establish proximate cause there must first be a duty or obligation on the part of the actor to maintain a *reasonable standard of conduct.*" (emphasis added) ALEXANDER, *supra* note 13 at 699.

[242] PROSSER, *supra* note 3, § 42 at 274-275.

[243] Woods, *supra* note 69 at 398. See also *Id.*, note 92 for analogy of relationship of causation and breach of duty in the common law of rescue.

What consequences would the reasonable person expect to follow from the conduct? Generally the defendant is liable if the reasonable person could foresee the likelihood of injury that occurred.[244] Since no specific injury is ever foreseeable in every detail, when foreseeability is a prerequisite to liability, the exact details of the actual injury need not have been foreseen.[245] A Pennsylvania court concluded that teachers are not "[r]equired to anticipate the myriad unexpected acts which occur daily in classrooms."[246]

The vast number of contributing factors that influence the outcome of the educational process have led both legal scholars and the courts to contend that causation would be difficult, if not impossible, to prove.[247] One popular argument is that a failure to teach does not cause a state of illiteracy because a child is born ignorant of how to read or write, thus failure to achieve a certain level of academic achievement leaves the child no worse off than when

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[244] MORRIS, *supra* note 5, § 5 at 171.

[245] *Id.*

[246] Simonetti v. School District of Philadelphia, 454 A.2d 1038, 1041 (Pa. Super. Ct. 1982), *appeal dismissed*, 473 A.2d 1015 (Pa. 1984) (Teacher was monitoring hallway as students returned from recess. Student entering classroom was struck in the eye by a pencil that had been thrown by a classmate.)

[247] Calvenna, *supra* note 69 at 728-729, Funston, *supra* note 69 at 784, Tracy, *supra* note 153 at 583, Deborah D. Dye, *Education Malpractice: A Cause of Action That Failed To Pass The Test,* 90 W. VA. L. REV. 499, 507 (1987).

he or she entered the educational system.[248] The court in *Donohue* stated: "The failure to learn does not bespeak a failure to teach."[249] Strict application of the "but for" rule might support this argument, but at least one writer believes that this narrow interpretation goes too far stating: "A student's inability to read or write when he enters school clearly does not warrant the conclusion that an active cause is operating that will *preclude* his learning in the future whether or not he is adequately instructed."[250] It is the multiplicity of factors affecting the learning process that is more often cited as a reason for refusing to recognize a suit for educational malpractice. The *Peter W.* court held:

> The achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.[251]

This has been cited with approval in the opinions of several

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[248] Funston, *supra* note 69 at 785, Tracy, *supra* note 153 at 583.

[249] Donohue v. Copiague Union Free School District, 64 A.D. 2d. at 39, 407 N.Y.S. 2d at 881.

[250] Tracy, *supra* note 153 at 584 (emphasis added).

[251] Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 861 (1976).

other cases dealing with the question of educational malpractice.

Other writers, while acknowledging the problems associated with multiple causative factors, point out this only represents a problem of proof for the plaintiff and does not justify judicial refusal to recognize a cause of action in all cases.[252] The New York Court of Appeals, in *Donohue*, reflected a similar attitude stating in dicta that while causation "[m]ight indeed be difficult, if not impossible, to prove . . . it perhaps assumes too much to conclude that it could never be established."[253] It has been urged that the questions of fact be put to a jury.[254] In *B.M. v. State*, the Supreme Court of Montana noted that questions of breach of duty and the breach as a cause of any injury "[r]aise material questions of fact for which a trial is necessary."[255]

The issue in an educational malpractice case is whether the school district and/or individual educators failed to

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[252] Terrence P. Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J. LAW & EDUCATION 479, 498-499 (1982), Wilkins, *supra* note 72 at 458, Robert H. Jerry, *Recovery in Tort for Educational Malpractice: Problems of Theory and Policy*, 29 KS. L. REV. 195, 204 (1981).

[253] Donohue v. Copiague Union Free School Dist., 64 A.D. 2d. at 39, 418 N.Y.S. 2d 375, 377, 47 N.Y. 2d 440, 443 (1979)

[254] Woods, *supra* note 69 at 399, Elson, *supra* note 153 at 747, Collingsworth, *supra* note 252 at 499.

[255] B.M. v. State, 649 P.2d 425, 426 (Mont. 1982).

take reasonable measures under the circumstances and this conduct was a cause of the student's educational injury.[256] It would appear that based on the "substantial factor" rule there is no requirement that the educator's conduct be the sole or even dominant factor in causing harm to the student.[257] One writer notes that proximate cause is self-evident under the formulation that a student's failure to learn is clearly among the foreseeable risks of a teacher's poor classroom methods.[258]

Injury/damage

The final element necessary for a cause of action based in the theory of negligence is that of actual loss or damage to the interests of another.[259] A court will not rule on a controversy unless the plaintiff can be compensated by some judicially manageable remedy.[260] Terms that are used interchangeably with loss and damage are "injury" and "harm". As in the case of causation, legal scholars and

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[256] Woods, *supra* note 69 at 398.

[257] For definition of the "substantial factor" rule see *supra* note 245.

[258] *COMMENT: Educational Malpractice, supra* note 78 at 768. *Contra* see *supra* notes 248 to 251 concerning lack of consensus or evidence that classroom methodology impacts student learning.

[259] PROSSER, *supra* note 3, § 30 at 165. *See generally* 74 AM. JUR. 2D, *Torts* § 7 at 625-626

[260] RESTATEMENT (SECOND) of TORTS, § 903 (defining compensatory damages).

the courts are divided in their assessment of how easy or difficult the actual definition and measurement of educational injuries might be. At least part of the difficulty is related to the problems of differing purposes and goals of schooling.[261] A few writers have taken the rather simplistic approach that indisputably plaintiffs suffer harm[262] and the true victims of educational malpractice will have no difficulty in establishing harm as a result of decreased ability to seek gainful employment.[263] Other commentators have stated that definition and measurement of injuries in a legally recognizable manner are at least as difficult as establishing duty, standards, and causation.[264] In *Peter W.*, the court found "[n]o reasonable 'degree of certainty that . . . plaintiff suffered injury' within the law of negligence".[265] When refusing to recognize the "injury" of ignorance, the New York Supreme Court, Appellate Division relied on the argument of plaintiffs born lacking in knowledge, education and experience.[266]

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[261] *See generally* LYNCH, *supra* note 187 at 225-229.

[262] Klein, *supra* note 110 at 48.

[263] Wilkins, *supra* note 72 at 458.

[264] Funston, *supra* note 69 at 783,

[265] 131 Cal. Rptr. 854, 861, 60 Cal. App.3d 814, 825. (Quoted with approval in Donohue).

[266] Donohue v. Copiage Union Free School Dist., 407 N.Y.S.2d 874,880 (1978).

Subsequently the New York Court of Appeals conceded that the inability to comprehend simple English upon graduation from high school represented a type of "injury", but still refused to recognize educational malpractice as a cause of action based on public policy concerns.[267] Many are in agreement, however, that the difficulties in definition and measurement are not legitimate reasons to refuse to recognize educational malpractice as a proper cause of action.[268]

Three basic types of injuries may be alleged in educational malpractice suits: failure to learn a given amount of factual information, failure to learn basic skills, and harm in the affective or emotional domain.[269] Examples of these injuries might be the inability to secure and hold employment due to lack of basic skills[270] or the loss of the motivation and self-confidence necessary to learn resulting from the emotional injury caused by a teacher's ridiculing and berating a student.[271] Daniel Hoffman claimed the misclassification and improper

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[267] 418 N.Y.S.2d 375,377 (1979).

[268] Collingsworth, *supra* note 252 at 502, Jerry, *supra* note 252 at 203, Elson, *supra* note 153 at 755.

[269] Elson, *supra* note 153 at 755.

[270] Peter W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854,856, 60 Cal. App.3d 817,818 (1976), Woods, *supra* note 69 at 399,

[271] Elson, *supra* note 153 at 755.

enrollment in classes for Children with Retarded Mental Development (CRMD) resulted in severe injury to his intellectual and emotional well-being and reduced his ability to obtain employment.[272]

A claim of purely mental injuries such as harm in the affective domain will meet with traditional common law disfavor. [273] One writer noted if the psychological harm claimed is lowered self-esteem, then the value of literacy to a individual is so highly personal that the calculation of damages would be speculative.[274] Although there has been some relaxation of the rule[275] it is generally held there can be no recovery for psychological damages in the absence of physical injury.[276] Despite the potential difficulties involved for the educational malpractice plaintiff,[277] mental

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[272] Hoffman v. Board of Education 400 N.E.2d 317, 49 N.Y.2d 121, 125, 424 N.Y. Supp.2d 376, 378 (1979).

[273] Elson, *supra* note 153 at 755, Tracy, *supra* note 153 at 580.

[274] Funston, *supra* note 69 at 784.

[275] PROSSER, *supra* note 3, § 54 at 364-365.

[276] *Id.* at 361. Compare Rowe v. Bennett, 514 A.2d 802 (Me. 1986) (social worker counselor malpractice; claim allowed for emotional distress alone).

[277] *See* e.*g.*, Village Community School v. Adler, 124 Misc. 2d 817, 478 N.Y.S.2d 546,548-549 (1984) (court held that there may be recovery for emotional distress from a negligent act, but may not sue for mental distress caused by *negligence in educational practices*") (emphasis added).

harms are recognized as a legitimate basis of legal redress and are commonly assessed as money damages.[278]

The claim of loss of expectancy or failure to receive a benefit from non-negligent education, particularly of a specific type of employment or level of income may also present problems for the plaintiff.[279] In *Moch v. Rensselaer Water Co.* the court held actions that caused denial of a benefit did not constitute an injury within tort.[280] Analogy to *Moch* may be made for the student who fails to learn because of teacher negligence.[281] Even though lower-income employment may be a foreseeable consequence of an inadequate education, particularly through the high school level, the range of student ability is too broad to create the expectation of qualification for specific jobs.[282] The plaintiff in specific professional or vocational/technical education programs would conceivably have much less difficulty with the expectancy issue.[283] While education

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[278] Elson, *supra* note 153 at 756.

[279] Funston, *supra* note 69 at 784, Tracy, *supra* note 153 at 581.

[280] 247 N.Y. 160, 159 N.E. 896, 899 (1928).

[281] Funston, *supra* note 69 at 784. *Contra* see *COMMENT: Educational Malpractice*, *supra* note 78 at 775-778.

[282] Tracy, *supra* note 153 at 580-581.

[283] *See* e.*g.*, Peretti v. State of Montana, 464 F. Supp.784 (1979) (Students in aviation technology program brought suit against the state when the course was terminated due to cuts in funding. Literature published by the vocational center

beyond a certain level cannot guarantee an adequate financial income,[284] the student plaintiff might be able to recover for negligently induced loss of prospective pecuniary advantage.[285] To sustain this argument there must be evidence that some special relationship exists between the parties involved in the dispute.[286] One writer further contends the relationship is mandated and "individuals and society rely on the effectiveness of the relationship to produce an informed populace."[287]

Medical Malpractice as a Model

When looking at the formulation of standards of care for the professional, the evolutionary development of standards in medicine can serve as a useful model. Many of the early fears expressed by the courts concerning their ability to judge what constituted good medicine parallel judicial concerns about ruling on educational practices. Foremost among those concerns was the definition of a standard by which to judge the conduct of the medical practitioner.

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described the course as leading to a private pilots' license and to employment by the general aviation industry.)

[284] Calavenna, *supra* note 69 at 730.

[285] Klein, *supra* note 110 at 49.

[286] PROSSER, *supra* note 3, § 130 at 1008.

[287] Klein, *supra* note 110 at 49.

The civil liability of physicians was formally established in 1534 when Sir Anthony Fitzherbert ruled "[i]t is the duty of every artificer to exercise his art right and truly as he ought."[288] The first recorded decision on medical liability in English law actually occurred in 1374 and was an action brought against J. Mort, a surgeon.[289] The defendant was found not liable on a legal technicality, but the court held that "[i]f the surgeon does so well as he can and employs all his diligence to the cure, it is not right that he should be held culpable."[290] In 1794 the earliest reported medical malpractice case in the United States, *Cross v. Guthrey*, alleged that the defendant, having held himself out as a practicing physician skilled in surgery performed a mastectomy "[i]n the most unskilful, ignorant, and cruel manner, contrary to all the well-known rules and principles of practice in such cases."[291]

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[288] A. Fitzherbert, Natura Brevium, London, Richard Totell, 1553, cited in Andrew A. Sandor, *The History of Professional Liability Suits in the United States* 163 J.A.M.A. 459 (1957).

[289] Y.B. Hill., 48 Edw. III, f.6, pl.11, cited in Sandor, *supra* note 288 at 459. Also cited in ALLAN H. McCOID, PROFESSIONAL NEGLIGENCE 14 (Thomas G. Roady & William R. Andersen eds., 1960).

[290] *Id.*

[291] 2 Root 90 (Conn. 1794) cited in McCOID, *supra* note 289 at 14-15. It has been noted that this and several other early American cases were actually based more on the common law theory of breach of contract than on a theory of negligence. *Id.*, Sandor, *supra* note 288 at 460.

The Code of Hammurabi, 2030 B.C. set the early standards stating "If the surgeon has made a deep incision in the body of a free man and has caused the man's death, or has opened the carbuncle in the eye and so destroys the man's eye, they shall cut off his forehand."[292] From this severe yet simple ancient enunciation contemporary medical standards have evolved. The New York Supreme Court, ruling in *Pike v. Honsinger*, elaborated the rule for a physician or surgeon:

> Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. . . . The law holds him liable for an injury to his patient resulting from want of the requisite skill and knowledge or the omission to exercise reasonable care or the failure to use his best judgement.[293]

Another formulation of the rule notes a physician or surgeon must "[e]mploy such reasonable skill and diligence as is ordinarily exercised in his profession in the same general neighborhood having due regard to the advanced state of the profession at the time of the treatment."[294]

Unlike the standard of the fictitous "reasonable and prudent person" in ordinary negligence, the standard in medical negligence has historically been based on the

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[292] 2 BABYLON LAW, § 218 at 81, cited in CHARLES KRAMER & DANIEL KRAMER, MEDICAL MALPRACTICE, (5th ed. 1983).

[293] 155 N.Y. 201, 49 N.E. 760, 762 (1898).

[294] McHugh v. Audet, 72 F. Supp. 394, 399 (M.D. Pa.1947).

conduct of fellow practitioners.[295] Prosser notes reliance on a profession to set its own standard by adopting their own practices is unique to medicine.[296] In developing and altering specific standards, courts have had to deal with the doctrines of locality rules and medical custom. These two areas and their related factors will be discussed first followed by a discussion of selected medical cases that have set precedent for specific standards that might be used by analogy in actions alleging educational malpractice.

Locality Rule

The locality rule was originally designed to protect the country physician because it was assumed that the rural practitioner would be less well informed and less able to keep up with developments in research and technology.[297] In one of the earliest formulations of the rule a Kansas court stated: "In the smaller towns and country, those who practice medicine and surgery, though often possessing a through theoretical knowledge of the highest elements of the

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[295] John Kimbrough Johnson, Jr., *An Evaluation of Changes in the Medical Standard of Care* 23 VAND. L. REV. 729, 729 (1970).

[296] PROSSER, *supra* note 3, § 32 at 189. See *infra* notes 332 to 352 and related text for a discussion of the role of customary practice in setting standards.

[297] PATRICA DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, and PUBLIC POLICY 144 (1985), Gerald L. Michaud & Mark B. Hutton, *Medical Tort Law: The Emergence of a Specialty Standard of Care* 16 TULSA L.J. 720, 724 (1981), Jon Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation* 18 DE PAUL L.REV. 408, 410 (1969).

profession, do not enjoy so great opportunities of daily observation and practical operations . . . as those who reside in the metropolitan towns. . . ."[298] Stated more succinctly in *Small v. Howard,* it was noted that the defendant general practitioner "[w]as not bound to possess that high degree of art and skill possessed by eminent surgeons practicing in larger cities."[299]

Another reason for the establishment of the locality rule was the diversified and generally poor level of training doctors received.[300] Accreditation of medical schools by the American Medical Association's Council of Medical Education did not begin until 1906.[301] Prior to that time no standardization existed for curricula offered at the various training levels.[302]

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[298] Tefft v. Wilcox, 6 Kan. 33, 43 (1870). For other early formulations see Smothers v. Hanks, 34 Iowa 286 (1872), Hathorn v. Righmond, 48 Vt. 557 (1876).

[299] 128 Mass. 131,132, 35 Am. R. 363,365 (1880).

[300] Johnson, *supra* note 295 at 730.

[301] Michaud & Hutton, *supra* note 297 at 723.

[302] During the 19th century there were 457 medical colleges in the United States. This caused unrestricted competition, rivalry, and led to many abuses because a diploma automatically licensed a "graduate" to practice. The typical curriculum was a course of five to six lectures per day for a period of 16 weeks to 6 months. Frequently a "second course" was recommended that was an exact repetition of the first. In 1907 there were 160 medical schools and over half were graded as less than acceptable. Richard H. Young, *Medical Education in the United States* 34 J. MED.ED. 801, 802-803 (1959).

On a practical level, the locality rule was important in two inter-related contexts: (1) the ascertainment of an appropriate standard of medical care and (2) the limitation of expert testimony to witnesses familiar with the practices in the appropriate locale.[303] Strict adherence to the locality rule seemed to allow a local standard below that which was generally acceptable if other practitioners in the area adhered to the lower standard.[304] The absurdity of allowance for local substandard care was well illustrated by the court in *Douglas v. Bussabarger*:[305]

> When patients considering operations approach doctors in Raymond (Wash.), the doctors do not admit that they can be a little more careless and act with less responsibility than can doctors in Olympia, who can be a little more negligent than doctors in Tacoma, who can be a little more negligent than doctors in Seattle, who can be considerably more negligent than the doctors in New York City.[306]

Application of the locality rule also facilitated what has been termed the "conspiracy of silence" because

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[303] Waltz, *supra* note 297 at 409, DAVID M. HARNEY, MEDICAL MALPRACTICE § 3.3 at 95 (1980). It should be noted that in the subsequent edition of this work Harney discussed these two components, but not in direct relation to the locality rule. In fact the only mention of the locality rule was "this rule is giving way to modifications approaching a national standard." DAVID M. HARNEY, MEDICAL MALPRACTICE § 21.3 at 413 (2nd ed. 1987) (hereinafter HARNEY, 2nd ed.).

[304] Michaud & Hutton, *supra* note 297 at 724-725.

[305] 73 Wash. 2d 476, 438 P.2d 829 (1968).

[306] Id. at 490, 438 P.2d at 838.

colleagues were unwilling to testify against each other.[307] Commenting on the difficulty a medical malpractice plaintiff had in obtaining an expert witness on his behalf, the Supreme Court of Nebraska stated "We cannot overlook the well-known fact that in actions of this kind it is always difficult to obtain professional testimony at all."[308]

While the locality rule may have been appropriate when travel was difficult, communication was limited to letters, medical journals were rare, and little or no standardization of medical school curricula was available,[309] those reasons no longer exist. In overruling *Small v. Howard*,[310] one of the early formulations of the rule, the Supreme Court of Massachusetts noted "The time has come when the medical profession should no longer be Balkanized by the application of varying geographic standards in malpractice cases."[311] Supporting the elimination of the rule, the Supreme Court of North Carolina discussed the changes in medical school curricula, admissions standards, availability of continuing

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[307] Michaud & Hutton, *supra* note 297 at 724, HARNEY, *supra* note 303, § 3.3 at 100, MELVIN M. BELLI, LEGAL ASPECTS OF MEDICINE 3, 4 (James R. Vevaina, et al., eds., 1989), 1 DAVID W. LOUISELL & HAROLD WILLIAMS, MEDICAL MALPRACTICE § 14.01 (1986).

[308] Johnson v. Winston, 68 Neb. 425, 94 N.W. 607,609 (1903).

[309] Michaud & Hutton, *supra* note 297 at 735.

[310] 128 Mass. 131, 35 Am. R. 363 (1880).

[311] Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793, 798 (1968).

education courses and journals, and modes of transportation.[312] Some courts still adhere to the strict geographical concept of the locality rule[313] while others have completely abandoned it.[314]

In lieu of total rejection of the rule it has been suggested that geographical locality be considered along with elements such as "[a]vailability of facilities, specialization or general practice, proximity of specialists and special facilities."[315] Today the more common phrase is "same or similar communities"[316] and emphasis is usually placed on similarity of locality and medical practice rather than on geographical proximity.[317]

Evidence indicates the trend is toward recognition of national standards based on professional proficiency rather than geographic proximity.[318] A few courts have supported

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[312] Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393, 396 (1970).

[313] *See* e.*g.* Lockart v. Naclean, 77 Nev. 210, 361 P.2d 670 (1961), Ramsland v. Shaw, 341 Mass. 56, 166 N.E.2d 894 (1960), Versteeg v. Mowery, 72 Wash.2d 754, 435 P.2d 540 (1967).

[314] *See* e.*g.* Brune v. Belinkoff, 354 Mass.102, 235 N.E.2d 793 (1968), Penderson v. Dumouchel, 72 Wash.2d 73, 431 P.2d 973 (1967).

[315] Blair v. Eblen, 461 S.W.2d 370, 373 (Ky. App.1970).

[316] Waltz, *supra* note 297 at 411, Michaud & Hutton, *supra* note 297 at 726, Johnson, *supra* note 295 at 731.

[317] Waltz, *supra* note 297 at 411.

[318] *Id.* at 730.

the argument by noting certain practices and procedures are basic to all physicians and the standard of care is that of the profession generally not locally or regionally.[319] Some authors have noted in reality "most aspects of the practice of medicine are, or should be, so universally known and followed that they are accepted as standards throughout the profession" regardless of practice setting.[320]

Several other arguments made in support of national standards include the national accrediting system which provides some standardization of medical schools[321] and the use of nationally recognized textbooks.[322] The examination taken by all physicians prior to licensure is a national exam, evaluated by a group selected to eliminate regional pecularities.[323] Additionally many states have enacted

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[319] Murphy v. Little, 112 Ga. App. 517, 145 S.E.2d 760 (1965) (dealing with the proper treatment of fractures), Christian v. Jeter, 445 S.W.2d 51 (Tex. Civ. App. 1969) (use of follow-up x-rays after treatment of dislocated elbow), Priest v. Lindig, 583 P.2d 173 (Alaska 1978) (inspection and detection of post-surgical wound infections).

[320] Michaud & Hutton, *supra* note 297 at 730. The authors go on to point out "Although different treatment methods may be expressed by various medical experts who testify, very seldom will those methods be geographically oriented." *Id.*

[321] Johnson, *supra* note 295 at 732-733.

[322] Michaud & Hutton, *supra* note 297 at 728.

[323] *Id.*. Up until 1992 a physician could become licensed by taking one of two nationally recognized examinations: the Federation Licensing Examination (FLEX), or the National Board of Medical Examiners (NBME) three part series. The USMLE is scheduled to become the sole source of licensure by June 1994. CATHERINE M. BIDESE, U.S. MEDICAL LICENSURE

legislation or created regulations requiring continuing medical education for re-registration of the license to practice medicine.[324] Many of the conferences and courses used to satisfy this requirement are available to a nationwide audience.[325]

Courts have generally been more willing to apply a national standard to specialists.[326] As the court in *Brune* stated "One holding himself out as a specialist should be held to the standard of skill of the average member of the profession practicing the specialty, taking into account the advances in the profession."[327] Simarily in *Christy v. Saliterman* it was noted "While the 'locality rule' may still have some validity, as it applies to a general practitioner, it should provide no defense to a specialist who is presumed to be acquainted with the *national standards* of his

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STATISTICS AND CURRENT LICENSURE REQUIREMENTS 60 (1993 ed.).

[324] The states requiring CME for reregistration include: Alabama, Alaska, Arizona, California, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Rhode Island, Washington, West Virginia, Wisconsin. *Id.* at 40-41.

[325] For a current list of continuing education opportunities for physicians *see generally* 270 J.A.M.A. 103-124 (1993).

[326] *See* e.*g.* Early v. Noblin, 380 So.2d 272 (Ala. 1980), Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970), O'Neil v. Great Plains Women's Clinic, Inc., 759 F.2d 787 (CA10 Okla. 1985), Moultrie v. Medical University of South Carolina, 280 S.C.159, 311 S.E.2d 730 (1984).

[327] Brune v. Belinkoff, 235 N.E.2d 793, 798 (Mass. 1968).

profession."[328] Certification as a specialist within each of the American Medical Association's recognized specialties is based on criteria uniformly applied nationwide.[329] One survey indicated that the practice of medicine by certified specialists within most medical specialties is similar throughout the country.[330] In apparent contradiction Kinney and Wilder cite multiple studies conducted in the last decade describing sharp differences in clinical practice among different geographic areas.[331]

No matter what boundaries a court applies to the doctrine of locality, there remains the question of how the professional standard of conduct should be defined. Should the customary practice of the profession be the sole identifier of the standard or should some other professional referent be used?

Customary Practice

Evidence of custom or a relatively well defined and regular usage among an occupational group is generally

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[328] 288 Minn. 144, 179 N.W.2d 288, 302 (1970)(emphasis added).

[329] For specific requirements by specialty *see generally* AMERICAN MEDICAL ASSOCIATION, 1991-1992 DIRECTORY of GRADUATE MEDICAL EDUCATION PROGRAMS, Appendix B.

[330] *Note, Medical Specialties and the Locality Rule* 14 STAN.L. REV. 884,887-89 (1962), *contra* see David M. Eddy, *Variations in Physician Practice: The Role of Uncertainty* 3 HEALTH AFFAIRS 74 (1984).

[331] Eleanor D. Kinney & Marilyn M. Wilder, *Medical Standard Setting in the Current Malpractice Environment: Problems and Possibilities* 22 U.C. DAVIS L. REV. 421 (1989):425.

admissible in determination of the proper standard of conduct in ordinary negligence cases, but it is not a conclusive one.[332] In cases of medical negligence, however, professional custom becomes almost exclusively the measure of due care.[333] Customary medical practice emphasizes the typical conduct of the medical practitioners and may reflect little more than professional habit.

When different schools of thought or different methods are followed by various groups within a profession, the actor is to be judged by the standards of the group to which he belongs.[334] To be recognized as a school, there must be definite rules and principles of treatment and these rules and principles must be the line of thought of a respectable minority of the profession.[335] No matter what "school" one professes to follow, there are minimum requirements of skill and scientific knowledge anyone claiming to be competent to treat human ailments must have.[336] An associated concern is what to do with "emerging" acceptable procedures for as one writer stated, "The law should not penalize intelligent

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[332] McCOID, *supra* note 289 at 69.

[333] *Id.* at 70.

[334] RESTATEMENT (SECOND) OF TORTS, § 229A, comment f.

[335] PROSSER, *supra* note 3, § 32 at 187.

[336] *Id.*. For a more in-depth discussion of "school of practice" see *generally* McCOID, *supra* note 289 at 24-29, HARNEY, *supra* note 303 at 3.4.

progress, but it need not license mere change as improvement."[337]

Many reasons have been offered for reliance on the custom test.[338] These include the special knowledge and skill physicians hold themselves out to the public as having,[339] the lack of capacity of lay triers of fact to evaluate the technical judgement of physicians,[340] and the heavy administrative burden that would result if the entire profession had to change its procedures because a court decided a custom was negligent.[341] McCoid suggested that the courts have chosen to give the medical profession a preferred status to allow freedom to practice without fear of later being judged with after-the-fact knowledge of unfortunate results.[342] A final rationale for the use of custom as standard asserts that custom sets the social norm and represents consensus as to what is appropriate medical

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[337] WILLIAM J. CURRAN, PROFESSIONAL NEGLIGENCE 7 (Thomas G. Roady & William R. Andersen eds. 1960).

[338] Johnson, *supra* note 295 at 743.

[339] RESTATEMENT (SECOND) OF TORTS, § 299A at 73.

[340] *Id.*, DANZON, *supra* note 297 at 140, CURRAN, *supra* note 337 at 5, Randall Bovbjerg, *The Medical Malpractice Standard of Care: HMOs and Customary Practice* 1975 DUKE L.J. 1375, 1392.

[341] Johnson, *supra* note 295 at 743.

[342] *Id.*, McCOID, *supra* note 289 at 72.

care and what is the level of safety and allocation of risk preferred by those at risk.[343]

Several legal scholars have commented on the potential problems when the customary standard is defined in terms of an "average" practitioner.[344] As the Illinois court pointed out in *Holtzman v. Hoy,* when determining who will meet the legal standard "[w]e are not permitted to aggregate into a common class the quacks, the young men who have had no practice, the old ones who have dropped out of practice, the good, and the very best, and then strike an average between them."[345] The inherent flaw in the "average" formulation has been explained as follows:

> [The standard] is that which is commonly possessed by members of that profession or trade in good standing . . . not that of the most highly skilled, nor is it that of the average member . . . since those who have less than median or average skill may still be competent and qualified. Half of the physicians of America do not automatically become negligent in practicing medicine at all, merely because their skill is less than the professional average.[346]

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[343] DANZON, *supra* note 297 at 141, Bovbjerg, *supra* note 340 at 1393. This reasoning is based on ideal standards established in free market transactions where both parties are fully informed and have equal bargaining positions. *Id.*.

[344] HARNEY, *supra* note 303, § 3.1(C), McCOID, *supra* note 289 at 23, Michaud & Hutton, *supra* note 297 at 732, JOSEPH H. KING, THE LAW OF MEDICAL MALPRACTICE IN A NUTSHELL (1986):75, PROSSER, *supra* note 3, § 32 at 187.

[345] 118 Ill. 534, 536, 8 N.E. 832, 832, 59 Am.Rep. 390 (1886).

[346] RESTATEMENT (SECOND) OF TORTS, § 299A, comment e.

Although courts which use the word "average" may intend it in the sense of "ordinary" or "commonly possessed", the recommendation is that the term "average" be avoided[347] since it is not the middle but the minimum common skill of those in good professional standing that is to be considered.[348]

A basic question of concern to courts and scholars is whether "customary practice" necessarily represents "good medical practice".[349] As stated in dictum in *Lundahl v. Rockford Memorial Hospital Association,* "It is entirely possible . . . that what is the usual or customary procedure might itself be negligence."[350] One writer warns "[B]y focusing attention almost exclusively on what practices are customary, instead of on what practices are desirable . . . all concerned may lose sight of the standards' actual impacts on end results."[351] A better approach would be to

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[347] HARNEY, *supra* note 303, 3.1(C) at 92, Michaud & Hutton, *supra* note 297 at 732, McCOID, *supra* note 289 at 23.

[348] PROSSER, *supra* note 3, § 32 at 187.

[349] HARNEY, *supra* note 303, 3.1(B), KING, *supra* note 344 at 236, Johnson, *supra* note 295 at 742, McCOID, *supra* note 289 at 70.

[350] 93 Ill. App.2d 461, 235 N.E.2d 671, 674 (1968).

[351] Bovbjerg, *supra* note 340 at 1400. As an example, it has been suggested that ability to pay for medical services has led to a systematic divergence between what is customary practice and what is socially optimal practice. Insurance supposedly undermines the consumer's incentive to be cost-conscious and the fee-for-service method of reimbursement leads to utilization of services beyond cost-effective levels. DANZON, *supra* note 297 at 142.

require conformity to an "accepted practice" formulation emphasizing performance expectations of the profession instead of the historical habits.[352]

A few areas of exceptions to the customary practice application have been recognized. Some courts have held a doctor cannot escape liability by establishing customary practice when the physician's acts have been so obviously careless that any layman could determine whether the doctor has in fact been negligent.[353] In this "common knowledge" doctrine the issue of negligence is not related to technical matters solely within the knowledge of the medical profession and as such there is no need for expert testimony to establish the standard of care.[354] A closely related doctine is *res ipsa loquitur* which is based on an assumption that the negligence may be inferred from the nature of the resultant injury.[355] A primary difference in the two doctrines is that proof may be based on circumstantial

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[352] KING, *supra* note 344 at 1236-1238. See *infra* notes 366 to 369 and accompanying text on professionally developed performance standards.

[353] Johnson, *supra* note 295 at 744.

[354] KING, *supra* note 344 at 1258.

[355] *Id.*. See *generally* McCOID, *supra* note 289 at 85-95, PROSSER, *supra* note 3, § 39, LOUISELL & WILLIAMS, *supra* note 307 at 14.02.

evidence in *res ipsa* cases, but there must be direct evidence of negligence in common knowledge cases.[356]

With the expansion of the locality rule to encompass "same or similar" or national perspective and the criticism of customary practice, there remains the question of who should define the standard: the courts, the legislatures or the profession? Judge Learned Hand, in noting that reliance on custom may cause an entire profession to lag in the adoption of improvements, stated "[A] whole calling . . . may never set its own tests, however pervasive its usages. Courts must in the end say what is required."[357] Curran also supports construction of the professional standard by the court.[358] As previously discussed, the courts have indeed been active in the establishment of standards both in terms of locality and customs to be followed and in defining specific areas of responsibility.

State legislatures have also taken an active role in establishing standards, predominantly through the creation of licensing and regulatory agencies.[359] These agencies have

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[356] *Id.*

[357] The T.J. Hooper, 60 F.2d 737, 740 (1932) (citations omitted) (A barge was lost in a storm. Had the pilot used a short-wave radio, not commonly in use at the time, he would have known of the approaching storm and been able to safely return to port.)

[358] CURRAN, *supra* note 337 at 6.

[359] ROBERT S. ASHER, LEGAL ASPECTS OF MEDICINE 26-32 (James R. Vevaina, et al. eds. 1989).

the power to issue licenses, investigate allegations of substandard or fraudulent practice, and revoke licenses.[360] Additionally, many legislatures have passed statutes defining standards of care owed to patients by medical specialists.[361] It has been stated that "[t]he primary method of regulating the practice of medicine is, of course, by legislation directly requiring practitioners to do or refrain from doing specified acts or things, or controlling and regulating the manner and circumstances in which specified phases of the practice shall be performed."[362] Examples include reports and records,[363] administration of anesthetics,[364] and administration of narcotics.[365]

The group perhaps most active in defining medical standards has been the profession itself. Although traditionally physicians have been unwilling to accept the

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[360] *Id.*

[361] See, e.*g.* VA. CODE, § 8.01-581.12:1 (statewide standard except where same or similar locality would be more appropriate), 76 OK. STATUTE SUPP. 1983, § 20.1 (national standard for all practitioners), REV. CODE WASH. 7.70.040 (statewide standard), LA. REV. STAT. ANN., § 9:2794 (1975) (national standard by specialty). *See generally* Jay M. Zitter, *Standard of Care Owed to Patient by Medical Specialist as Determined by Local, "Like Community", State, National, or Other Standards* 18 A.L.R.4th 603.

[362] 61 AM. JUR. 2d *Physicians and Surgeons* § 135 at 270.

[363] *Id.* § 136.

[364] *Id.* § 138.

[365] *Id.* § 139.

idea of national standards, in recent years there has been a growing effort within the medical community to define quality care with respect to specific procedures and treatment of specific diseases.[366] One form of defined care is the clinical practice protocol[367] which may be developed in three ways: (1) by individual physicians for use in a local context such as a hospital; (2) by commercial enterprises with physician input; and (3) by national medical specialty societies, voluntary health organizations or government agencies.[368] Individually sponsored practice protocols vary in degrees of sophistication, but there is a growing trend in computerized consultation services which suggest normative approaches to diagnosis and treatment decisions.[369]

Government agencies such as the Public Health Service (PHS) and the Health Care Financing Administration (HCFA) are active in developing clinical practice protocols and other medical standards. Within PHS, the National Institutes of Health (NIH), through various offices, establishes standards related to medical technologies,

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[366] Kinney & Wilder, *supra* note 331 at 423.

[367] *Id.*

[368] *Id.* at 427.

[369] *Id.* at 435-436.

treatment modalities, and evaluation of patient outcomes.[370] HCFA is primarily involved in developing policies concerning reimbursement for services under the Medicare program.[371] The current reimbursement system, introduced in 1983, is based on diagnosis-related groups (DRGs) and is applied nationwide.[372]

Institutional Standards of Care

Medical institutions and in particular hospitals have been involved in malpractice litigation both as primary defendant and when its employees have been accused of negligence. The institution's duty toward its patients and the standards of care by which the performance of that duty is measured has evolved in much the same manner as the standards for individual medical practitioners. The locality rule and customary care as established by expert testimony have been central to the determination of standards for both individuals and institutions. A major difference is that in cases involving institutions, exceptions have been made to the necessity of expert testimony to establish standards of care and written standards such as licensing regulations, accreditation

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[370] *Id.* at 431-433.

[371] *Id.* at 434.

[372] DANZON, *supra* note 297 at 144. Small allowances based on a specific formula are made for regional differences.

standards and institutional bylaws have been admitted as evidence.[373]

Hospital liability has historically been based on two legal theories: the doctrine of respondeat superior and the doctrine of corporate negligence.[374] The doctrine of respondeat superior simply states an employer is liable to a third party for the tort of an employee committed within the scope of employment. The hospital is being held vicariously liable and is not itself directly at fault.[375] Central to the respondeat superior doctrine are the questions of whether the person committing the tort was an agent or employee of the hospital and whether the tort was within that agent's scope of employment. A key issue in the field of hospital liability has been the concept that the privately practicing physician, although a member of the medical staff with delineated privileges, is an independent contractor.[376] Multiple factors have caused the courts to

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[373] CHARLES KRAMER, MEDICAL MALPRACTICE, Vol. 3 (1986):para. 29.01. See *infra* notes 402 to 410 and accompanying text for discussion of written standards.

[374] *See generally* AUTHUR F. SOUTHWICK, HOSPITAL LIABILITY: LAW AND PRACTICE 235-285 (Mary M. Bertolet & Lee S. Goldsmith eds., 1987).

[375] *Id.* at 237.

[376] *Id.* at 239. "By definition, an independent contractor is one who has sole control over the means and methods of the work to be accomplished, although the person who employs, hires, or appoints a contractor retains the right of control and power of approval over the final result of the work." *Id.* at 238-239.

expand the applicability of respondeat superior to include those previously defined as independent contractors so that now "the test of hospital liability for another's act is becoming simply a question of whether or not the actor causing injury was a part of the medical care organization."[377]

The second basis of institutional liability is the doctrine of corporate negligence. Under this doctrine the hospital as an entity or corporate institution owes a defined legal duty directly to the patient. This is notably different than the vicarious liability of the respondeat superior doctrine.[378] "The primary legal question is this: What direct duties does the hospital owe the patient or other third party."[379] The answer to the question depends on the role or purposes of the institution. Historically there was a fairly narrow concept that the hospital was there simply to provide physical facilities and accommodations for private physicians to care for and treat their patients.[380] Current trends focus on the hospital as a center for

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[377] *Id.* at 240-243 and note 38 at 250-251.

[378] *Id.* at 251.

[379] *Id.*

[380] *Id.* at 251.

providing a full range of care including preventive, curative, inpatient and outpatient.[301]

The corporate duties of a hospital center on the exercise of reasonable, ordinary care with respect to selection and maintenance of hospital equipment,[302] maintenance of buildings and grounds, and selection and retention of employees. The lines of distinction between the doctrine of respondeat superior and the doctrine of corporate negligence become blurred when discussing selection and retention of employees particularly when selection and retention of medical staff is included.[303] Violation of various hospital rules and regulations, by-laws, and accreditation standards in the selection and retention process may constitute grounds for corporate negligence.[304]

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[301] *Id.*

[302] *Id.* at 252-257. There is no duty to have the most current equipment, but a hospital must have the usual and customary equipment for the services offered. A difficulty in the application of this duty is finding a balance between cost containment in healthcare and adequate protection for the patient. *Id.*

[303] The existance of a duty is a matter of law for the court to decide, not a question of fact for the jury. Basic to the establishment of a duty is the forseeability of risk of harm. In the selection and retention of medical staff, the hospital's duty to the patient depends on whether it was foreseeable that the failure to closely evaluate the physician's credentials and qualifications could have caused an unreasonable risk of harm to someone. *Id.* at 272.

[304] *Id.* at 258-263.

The general liability of a hospital will depend on whether the institution is catagorized as public or private.[385] If it is created, owned and controlled by the state or its subdivisions, the hospital is considered a government agency and may be protected by soverign immunity. In jurisdictions where soverign immunity is recognized, the doctrine of respondeat superior does not apply.[386] In other jurisdictions the governmental aspect of a public hospital has been recognized, but has not precluded the application of respondeat superior.[387] "Where public institutions may be held liable for negligence, they are . . . held only to a duty of taking precautions against risks that may reasonably be perceived."[388]

An institution is considered private if it provides no charity treatment, is conducted purely for gain,[389] and is "owned, maintained and operated by an individual, a partnership or a corporation with any governmental agency in its control."[390] Private institutions may be held liable for

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[385] *See generally* 40 AM. JUR. 2d, § 20 and § 26.

[386] *Id.*, § 20 at 863. *See generally* STEVEN E. PEGALIS & H.F. WACHSMAN, 1 AMERICAN LAW OF MEDICAL MALPRACTICE § 3:32 (1980).

[387] *Supra* note 385, § 20 at 864 (citations omitted).

[388] *Id.* at 865.

[389] 40 AM. JUR. 2d, § 26 at 868.

[390] PEGALIS & WACHSMAN, *supra* note 386, § 3:2 at 121-122. If those operating the hospital have sole management authority,

the negligence of their employees where there has been negligence or a wrongful act, but personal injury is not a basis for action.[391] The standard of care does not differ for private and public institution.

Two rules are frequently stated by the courts in defining the standard of care of a hospital toward a patient, but these rules generally apply in two distinctly different situations.[392] If the conduct is professional in nature, then the applicable standard is "[t]he care exercised by hospitals generally (or by hospitals in the community)."[393] Where the conduct is considered nonprofessional, defined as nonmedical, administrative, ministerial or routine care, the rule applied is "[s]uch reasonable care as the patient's known condition may require."[394] Because of the increasing difficulty in

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the fact that the hospital is operated for the benefit of the public and not for profit does not change its character as a private institution. *Id.*

[391] *Supra* note 389 at 869.

[392] Court decisions that have distinguished between the two rules include Hayhurst v. Boyd Hospital, 43 Idaho 661, 254 P. 528 (1927) and Duling v. Bluefield Sanitarium, Inc., 149 W.Va. 567, 142 S.E. 2d 754 (1965).

[393] Kastler v. Iowa Methodist Hospital, 193 N.W.2d 98, 101 (1971) (citations omitted).

[394] *Id.* Another way this rule has been stated is "[s]uch reasonable care and attention for the patient's safety as his mental and physical condition, if known, require, and such care as is commensurate with the known inability of the patient to take care of himself." 36 A.L.R. 3d 440, 455 (citing Duling v. Bluefield Sanitarium, Inc., 149 W. Va.

distinguishing between administrative responsibility and individual responsibility for patient care in the institutional setting, the rules are not always considered separate. For example, in *Bing v. Thuning*[395] the lines of distinction were eliminated for nursing.

The locality rule and the various geographical descriptors of the community have been the predominate basis used for defining care standards.[396] Some jurisdictions use a narrowly defined geographic "community" or "locality", others apply the definition of "same or similar communities" or "similar localities".[397] There is growing criticism of the community standard particularly in view of the standardizing influence of hospital license requirements and accreditation standards.[398] In fact some courts have held that national standards were applicable to the case at bar even though the state subscribed to a more restrictive form

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567, 142 S.E.2d 754 (1965)).

[395] 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

[396] See *generally* David A. Johns, *Annotation: Locality Rule As Governing Hospitals Standard Of Care To Patient And Expert's Competency To Testify Thereto,* 36 A.L.R.3d 440.

[397] For an annotated discussion of specific jurisdictions and relevant cases see *Id.* at 447-451 and applicable supplemental updates.

[398] *Id.* at 444. *See for example* Avey v. St. Francis, 201 Kan. 687, 442 P. 2d 1013, 1022 (1968), Dickinson v. Mailliard, 175 N.W. 2d 588, 596 (Iowa 1970).

of the locality rule.[399] When there is an imposition of liability on the hospital for acts or omissions of its employees, the type of standard individual practitioners are held to may indirectly affect the type of standard applicable to the institution.[400]

Written standards may provide an alternative approach to the use of expert testimony in the establishment of relevant standards of care from customary practice.[401] When submitted as evidence at trial a written standard may have a much greater impact than the more traditional expert testimony because written standards have generally been developed and endorsed by a large number of practitioners in the area.[402] Written standards have been developed by national accrediting agencies such as the Joint Commission on the Accreditation of Health Organizations (JCAHO),[403] federal law, state licensing and regulatory boards, and individual healthcare institutions. [404]

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[399] *See e.g.* Cornfeldt v. Tongen, 262 N.W. 2d 684 (1977), Cassady v. Hendrickson, 486 N.E.2d 1329 (1985).

[400] 36 A.L.R.3d at 446.

[401] Gwen M. Schockemoehl, *Admissibility Of Written Standards As Evidence Of The Care In Medical And Hospital Negligence Actions In Virginia*, 18 U. RICH. L. REV. 725 (1984).

[402] *Id.* at 734, Kinney & Wilder *supra* note 331 at 446.

[403] Formerly known as the Joint Commission on the Accreditation of Hospitals (JCAH).

[404] Schockemoehl, *supra* note 401 at 725.

Of particular consequence is the influence of JCAHO standards. While institutional accreditation or reaccreditation by JCAHO is voluntary, issues such as reimbursement under Medicare and Medicaid and state licensing of hospitals may be closely tied to JCAHO standards.[405] Additionally, many federal and state regulations, which have the force of law, closely correspond to the standards set by JCAHO.[406]

Institution-specific standards, such as by-laws and policy and procedure manuals, are generally intended to be minimal standards for that institution and need not be accepted within the medical profession as a whole.[407] However, if these locally developed standards are viewed as including standards required for state licensure, Medicare/Medicaid reimbursement, or accreditation, the defense that the standards are voluntary is greatly weakened.[408] Indeed, beginning with *Darling,* courts have

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[405] Schockemoehl *supra* note 401 at 733-734, WILLIAM H.L. DORNETTE, HOSPITAL LIABILITY: LAW AND PRACTICE 208, 210-211 (Mary M. Bertolet & Lee S. Goldsmith eds., 5th ed. 1987).

[406] Schockemoehl *supra* note 401 at 734, DORNETTE, *supra* note 405 at 211-212.

[407] Kinney & Wilder, *supra* note 331 at 448. It must be noted, however, the prestige of the institution, prestige of the authors, or publication in national professional journals may make these local standards more persuasive as evidence of a standard applicable beyond a specific institution. *Id.*

[408] *See e.g.* Johnson v. Misericordia Community Hospital, 99 Wis. 2d 708, 301 N.W.2d 156 (1981), Sophia Elam v. College

recognized self-imposed standards as relevant in aiding in the determination of the standard of care. As discussed previously failure to have and implement hospital rules may constitute corporate negligence.[409]

Summary

An overview of multiple legal concepts has been provided to develop the foundation for this study. The chapter began with a discussion of tort law including the establishment of liability. Several classifications used to distinguish educational malpractice cases were presented. "Pure" cases predominantly allege improper instruction while "hybrid" cases allege improper placement. It was noted that many cases have elements of both types of complaints. Misrepresentation, breach of contract, and constitutional and statutory rights were examined as legal theories of recovery in educational malpractice actions. Negligence is the theory central to this study and was reviewed at length. It was noted the element of duty is premised on an obligation to conform to a standard of care. The duty is breached by failure to conform to that standard. Professional negligence establishes a higher standard than that of the ordinary, reasonable person. The "but for" and "substantial factor" rules and the notion of foreseeability

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Park Hospital, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156, *modified*, 133 Cal. App. 3d 94a (1982).

[409] SOUTHWICK, *supra* note 375 at 260.

are central to proof of causation. Finally, failure to learn a given amount of information, failure to learn basic skills, and emotional harm were described as potential injury or damage in educational malpractice.

The final component of the chapter described the evolution of standards in medical malpractice as a model for the potential establishment of standards in educational malpractice. Improved standardization of medical school training, national testing prior to licensure, and specialization have all contributed to the decline in recognition of the locality rule and customary practice for the individual practitioner. Many groups are developing written standards of practice. Medical institutions may be found negligent based on the theories of corporate negligence or respondeat superior, but duty is frequently established by the written standards of the Joint Commission on the Accreditation on Health Organizations.

CHAPTER III

METHODOLOGY

The purpose of this study was to determine if there are written standards of care which could create a basis for liability in cases of educational malpractice. It is intended that the findings may provide justification for a remedy under the theory of negligence in the law of tort to cover the harms coused by negligence in education. The following research questions were addressed:

1. How might the development of standards of care in medical malpractice be sued by the courts in the recognition of standards of care for educators?

2. What educational accountability requirements currently mandated by state legislatures are creating standards of care that potentially assign liability to educators?

Historical-Legal Method

The historical-legal methodology was used for this study. As described by Nolte, this methodology combines components of classical historical research in education

with traditional legal research.[1] The general pattern of the historical-legal methodology is to study the past development of a problem pertaining to a given subject, then examine the current status of the law pertaining to that problem, and finally discuss possible future trends on the issue. It has been noted "[t]he researcher using this method draws together in one study . . . other findings on the problem, the law relating to its solution, and discusses possible trends toward its resolution."[2]

While no one true methodology is used by historical researchers,[3] several characteristics common to traditional historical inquiry were employed in this study. First, the study was context-specific: professional negligence was considered within the realm of education. The holding of a court in any given decision is based on the facts specific to that case, but members of the judiciary are influenced by current societal issues and decisions made in previous cases with facts similar to the one at bar. If it can be accepted that federal and state legislation and agency regulations reflect action taken on current social concerns, then analysis of judicial rulings influencing educational policy

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[1] M. CHESTER NOLTE, SCHOOL LAW UPDATE: PREVENTIVE SCHOOL LAW 97 (Thomas N. Jones and Darel P. Semler eds. 1984).

[2] *Id.*

[3] C.H. Edson, QUALITATIVE RESEARCH IN EDUCATION: FOCUS AND METHODS 51 (Robert R. Sherman and Rodman B. Webb eds., 1990).

in light of these actions may give additional meaning to the court's decisions.

A second characteristic of historical research used in this study was the presence of natural settings to test a theoretical model rather than contrived or purely experimental settings. Each case presented facts as they actually occurred and not as a preset event. A final quality of historical inquiry central to this study was the attempt to interpret and explain the significance of past events and the effect of these occurrences on present and future events for "[t]he past becomes relevant to the present only through interpretation and evaluation."[4]

Although characteristics of historical research will be noted, the primary research methodology used was that of traditional legal research. The legal research used in this study followed the five-step approach suggested by Cohen, Berring, and Olson.[5] The first step was to consider the facts of the question at hand and to turn those statements into propositions of available legal theory. For example: Is there a duty owed to students not to teach negligently? The framing of the legal question was a continuous part of the process and questions were refined as new light came to the issue at hand.

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[4] *Id.* at 48.

[5] MORRIS L. COHEN ET AL., FINDING THE LAW 470-482 (1989).

Second an overall understanding of the general area of law that includes the question was gained. Information on tort, ordinary negligence and professional negligence has been presented in Chapter II. The third step in legal research is an in-depth search for legal authority relevant to the question. Multiple search techniques were used for this step of the process. The fourth step was to read and evaluate primary and secondary sources of the law. Finally, each of these sources, discussed more fully in the subsequent section, were brought up to date to ascertain current opinion on the legal question.[6]

Data Sources

An overview of the subject was gained by using secondary sources such as law review articles, treatises, and other scholarly works. While reading these a list of related legal issues, relevant cases and additional secondary sources was compiled. Initial finding tools for law review articles included computer searches of data bases on INFOTRAC and WILSONDISC using descriptive word and topic search strategies. Other legal and nonlegal periodical sources were searched through databases available on ERIC, WESTLAW, and *Dissertation Abstracts*. The *American Law*

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[6] Other sources of guidance for legal research in education include H.C. HUDGINS, Jr. & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS (2nd ed. 1985) and JAMES H. McMILLAN & SALLY SHUMACHER, RESEARCH IN EDUCATION: A CONCEPTUAL INTRODUCTION (2nd ed. 1989).

Reports (A.L.R.) series and legal encyclopedias such as *Corpus Juris Secundum* and *American Jurisprudence* were consulted for additional commentary and annotations on selected decisions and topics.

Primary sources for legal authority included printed opinions of cases, federal and state statutes, and agency regulations. These sources are considered legally binding rather than merely descriptive or analytical.[7]

Although there is some variation from jurisdiction to jurisdiction, there are similar features in the form of statutory publication. Session laws are the authoritative, binding text of a legislative enactment.[8] Statutory codes publish general and permanent statutes in a fixed subject arrangement. Codes include the text of the law, brief editorial notes relating to the authority and historical development of the law, and may appear in either official or unofficial editions.[9] Annotated codes reproduce the text and arrangement of the official code, but delete repealed laws, and add information on new legislation, revisions, and amendments. Additionally, annotated codes "[i]nclude references to relevant judicial or administrative decisions,

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[7] COHEN ET AL., *supra* note 5 at 2-3.

[8] COHEN ET AL., *supra* note 5 at 145. Session laws are termed the positive law form of legislation. Unless otherwise designated, other forms, such as codes, are only *prima facie* evidence of the statutory language. *Id.*

[9] *Id.* at 145-146.

administrative code sections, encyclopedias, attorney general opinions, legislative history materials, law reviews, and treatises."[10] A few states publish their own annotated codes, but most are compiled by commercial publishers and contain some form of notification in the front of each volume indicating status as authority.[11]

Because education is a state function, federal statutes were not included in this study. State statutory research using the annotated code for each state was carried out using the topic and descriptive word methods. Where possible the designated official annotated code was used. Current updates and interpretations of statutes were noted using the most recently published pocket parts.[12]

Relevant case law was identified using descriptive word, topic, or table of cases methods. Because of jurisdictional variability, the search for cases on point was carried out for both federal and state level cases. United States Supreme Court cases appear in several publications including the *United States Reports* (U.S.) and the *Supreme Court Reporter* (S.Ct.). Looseleaf services such

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[10] *Id.* at 146. It should be noted that sections not yet considered in published court decisions may have no annotation. *Id.*

[11] *Id.* at 179.

[12] For more in-depth description of general legal research, *see generally* COHEN ET AL., *supra* note 5, MORRIS L. COHEN, LEGAL RESEARCH IN A NUTSHELL.

as *The United States Law Week* and *U.S. Supreme Court Bulletin* were also consulted. Decisions from the United States Courts of Appeals and United States District Courts within the federal court system are reported in the *Federal Supplement* (F. Supp.), the *Federal Reporter* (F.), and the *Federal Supplement, Second Series* (F.2d) These volumes as well as the seven regional reporters in the West Publishing Company's National Reporter System provide cases from the state court systems. Case history and current validity of the court's holdings were ascertained using the applicable edition of *Shepard's Citations*.

Except where particularly illustrative, agency regulations such as those established by state level departments of education were considered beyond the scope and intent of this study. Similarly, guidelines developed locally by municipal and county boards or commissions of education were not be searched.

Data Analysis

The primary emphasis of this study was the analysis of existing state statutes that potentially define standards of care applicable to educators. Compilation of information, summarized in table format, was provided in some areas to assist in ease of comparison for discussion of trends. Analysis of standards was grouped, were applicable, into K-12 and postsecondary levels. Were trends were generalizable to multiple educational levels no segregation was attempted.

Statutes were analyzed both for the potential to create a basis of liability in educational malpractice and for the potential definition of specific standards of care.

Educational malpractice cases that specifically addressed the area of standards for educators were read and analyzed around four major areas: the facts, the question, the decision and rationale, and the implications.[13] Cases were grouped using the "pure" and "peripheral" categories outlined by Collis.[14] Legal principles and implications within the cases specific to the standard of care question were analyzed in detail. The level of the court was noted to establish the hierarchy of authority. Similar analysis was carried out on landmark cases that recognized written standards of care in medical malpractice.

Legal analysis of statutes followed the steps recommended by Shapo.[15] First the exact text was read carefully to determine what conduct was prohibited, permitted or required.[16] Overall structure of sections were analyzed for use of specific words such as "or" indicating only one section need be followed,"and" indicating all connected parts must be fulfilled, "may" indicating

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[13] HUDGINS & VACCA, *supra* note 6 at 51.

[14] JOHN COLLIS, EDUCATIONAL MALPRACTICE (1991).

[15] HELEN S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW (1989).

[16] *Id.* at 48.

permission, "shall" indicating requirement, indicating all sections must be followed. The issues were isolated by determining what question was raised by the statutory language in terms of educational malpractice cases.[17] Effective dates were annotated to assist in determining potential chronological trends. Effective dates can also assist in determining if the statute was in effect at the time of the conduct at issue.[18] Of major importance to this study was analysis of legislative intent. This is used, when possible by the courts to determine what the legislators intended the statute to mean and what policy was ment to be pursued.[19] Only the exact statutory language was used to carry out analysis of the legislative intent. No attempt was made to research the legislative history or session compilations. Analysis of legislative intent included reading the statement in context with the entire statute and determining whether there was a single plain meaning of the words.[20]

Standards of Adequacy for Legal Research

Criteria for judging adequacy of a legal research study include a clearly defined statement of the legal issue,

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[17] *Id.*.

[18] *Supra* note 15 at 49.

[19] *Supra* note 15 at 54 to 55.

[20] *See generally* SHAPO, *supra* note 15, at 54 to 57.

scope and limitations of the problem explained, logical organization and analysis of data sources, careful selection of appropriate sources, unbiased treatment of the topic, and logical relationship of conclusions to the analysis.[21] Statement of the issues as well as scope and limitations were specifically addressed in Chapter I.

Criticism of sources in legal research is a primary concern.[22] According to McMillan and Shumacher external criticism determines whether the documents used are authentic.[23] Authenticity of case law was determined by using the commonly recognized federal and regional case reporting systems as primary source. As noted previously, primary sources for statutes were state official and annotated codes. Established legal citation standards were used in documentation of sources.[24]

Internal criticism determines the accuracy and trustworthiness of the statements in the source.[25] When using secondary sources such as law reviews and other scholarly writings, accuracy and trustworthiness were assessed based on the writers use of credible sources and

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[21] McMILLAN & SCHUMACHER, *supra* note 6 at 465.

[22] *Id.* at 446-450.

[23] *Id.* at 446.

[24] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, (15th ed. 1991).

[25] McMILLAN & SCHUMACHER, *supra* note 6 at 448.

the degree of bias presented. Conformation of stated ideas was sought by using multiple sources. Since a witness's chronological and geographical proximity to the events presented in the reported cases cannot be confirmed, accuracy and trustworthiness of statements were assumed. As stated previously, annotated codes and codes designated as official were used as data sources as much as possible. Any conclusions drawn from statutory compilations not designated as official were assumed to be tentative at best.

CHAPTER IV

ANALYSIS OF STATE STATUTES

The purpose of this study was to determine if there are written standards of care which could create a basis for liability in cases of educational malpractice. The following research questions were addressed:

1. How might the development of standards of care in medical malpractice be used by the courts in the recognition of standards of care for educators?

2. What educational accountability requirements currently mandated by state legislatures are creating standards of care that potentially assign liability to educators?

Statutorily defined measures of accountability were central to this study. These statutes outlined levels of care that educators, either individually or within an institution, are expected to follow in carrying out the duties of education. Legal analysis of the state statutes was completed to determine commonalities, differences and possible trends. During analysis of statutes covering issues of general accountability, several areas emerged that could be grouped as topics specifically related to individual educators: teachers defined as professionals,

teacher training and certification/licensure. Statutes related to accreditation were more specific to the educational institution and were analyzed as a group. Finally, statutes mandating standardized testing of students were analyzed as a group.

Part I is the analysis of statutes covering general issues of accountability and is divided into statutes applicable to the individual educator and statutes applicable to institutions providing education. Part II covers the topics specifically related to individual educators. Part III is the analysis of statutes covering accreditation and Part IV is an analysis of statutes covering standardized testing.

Part I--General Accountability

Individual Educators

A total of nineteen states had statutes outlining generalized accountability at the individual educator level. For analysis purposes these statutes were subdivided into states specifically using the term standards and states with more general terminology.

Statutes in twelve states clearly indicate members of the teaching profession are to abide by established standards and/or code of ethics.[1] These states include

[1] *E.g.* ALASKA STAT. § 14.20.480 (1992), CONN. GEN. STAT. ANN. § 10-1456 (West 1996), FLA. STAT. ch. 231.546 (1997), GA. CODE ANN. § 20-2-795 (1996), IDAHO CODE § 33-1254

Alaska, Connecticut, Florida, Georgia, Idaho, Kansas, Minnesota, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah. The Education Standards Commission in Florida has responsibility for the actual development of standards of professional practice, and "those who practice in this profession shall be obligated to abide by these standards."[2] An Oklahoma statute requires standards established by the State Board of Education be considered in determining adequate professional performance, but also allows consideration of "any standard of performance adopted by any other education-oriented organization or agency."[3]

Of the twelve states with specific statutes defining an individual educator's responsibility to abide by established standards, only Pennsylvania explicitly included faculty in higher education. The requirement is limited, however, to standards and professional requirements for community college faculty.[4] Idaho is the only state to limit

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(1995), KAN. STAT. ANN. § 72-8505 (1992), MINN. STAT. ANN. § 125.185 (West 1994), NEB. REV. STAT. § 79-866 (1996), N.D. CENT. CODE § 15-38-18 (1993), OKLA. STAT. ANN. tit. 70, § 6-101.21 (West 1998), PA. STAT. ANN. tit. 24, § 2070.5 (Supp. 1997), S.D. CODIFIED LAWS ANN. § 13-43-25 (Supp. 1997), UTAH CODE ANN. § 53A-7-110 (Supp. 1994).

[2] FLA. STAT. ch. 231.546 (2)(a)(1997).

[3] OKLA. STAT. ANN. tit. 70, § 6-101.21 (West 1998).

[4] PA. CONS. STAT. ANN., tit. 24 § 19-1902-A (1992).

applicability of established standards to teachers in the public schools.[5]

In addition to the twelve states mentioned above, Arizona, California, Massachusetts, Virginia, and Washington outlined requirements of accountability for individual educators, but did not use the actual term standards. An Arizona statute noted that a teacher failing to comply with outlined duties is guilty of unprofessional conduct and is subject to disciplinary action by the governing board.[6] Evaluation of a teacher's competency in California is based in part on the progress of that teacher's students toward achievement of district standards of performance.[7] Evaluation of teacher performance in Texas is partially based on the performance of the teacher's students.[8] Although not specifically tied to teacher evaluation, Massachusetts law clearly indicates educators are to be held accountable for student achievement of educational performance goals.[9] The Virginia General Assembly broadly

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[5] IDAHO CODE § 33-1254 (1995).

[6] ARZ. REV. STAT. ANN. § 15-521 (Supp. 1996)(Duties outlined include various forms of record keeping, student supervision, and promotion decisions).

[7] CAL. EDUC. CODE § 44662 (West Supp. 1997).

[8] TEXAS EDUC. CODE ANN. § 21.351 (West 1996).

[9] MASS. GEN. LAWS ANN. ch. 69, § 1 (West 1996). *But see infra* note 166 stating failure to obtain a competency determination does not provide a cause of action for educational malpractice.

yet simply states "school boards and school personnel are accountable."[10] Unlike the California and Massachusetts requirements to actually attain educational goals, Washington holds teaching and administrative staff "accountable for the proper and efficient conduct of classroom teaching" related only to the opportunity to achieve skills.[11]

Institutions

Analysis of statutes defining educational institutions as the unit of accountability was less straightforward than analysis of the individual educator's general accountability. Individual schools, school districts, and school boards were all considered educational institutions for purposes of this analysis. Although thirty-five states and the District of Columbia had statutes establishing standards, goals, or objectives of expected student achievement or outcomes, only nine states specifically held some institutional component accountable for the achievement of the student outcomes.[12] Those states specifying

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[10] VA. CODE ANN. § 22.1-253.13:3 (Michie 1997).

[11] WASH. REV. CODE ANN. § 28A.150.240 (West 1997).

[12] COLO. REV STAT. ANN. § 22-7-104 (West Supp. 1997), FLA. STAT. ch. 229.512 (1997), KY. REV. STAT. ANN. § 158.650 (Baldwin 1995), MISS. CODE ANN. § 37-1-2 (1996), NEV. REV. STAT. § 385.347 (1996), N.M. STAT. ANN. § 22-1-6 (Michie 1996), N.D. CENT. CODE § 15-20.4-03 (1993), UTAH CODE ANN. § 53A-1-601 (1994), VA. CODE ANN. § 22.1-253.13:3 (Michie 1997). Twenty-one states mandate student performance standards for K-12, however, only Colorado and Florida also establish state level student performance standards of

institutional level accountability included Colorado, Florida, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Utah, and Virginia.

Of these nine states, Florida defined the individual school as the unit of accountability[13] while Colorado, Kentucky, Nevada, and New Mexico assigned accountability at the school district level.[14] Mississippi and Utah required both the local school district and the schools "to account for the product of their efforts".[15] The Virginia Code specified that school boards and school personnel are accountable for student progress.[16] North Dakota was the only state to require compliance with minimum standards for postsecondary educational institutions but the requirement is limited to vocational and technical education.[17]

A growing statutory trend in institutional accountability was the requirement for a state level report

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higher education institutions. COLO.REV. STAT. ANN. § 22-53-302 (West Supp. 1994), FLA. STAT. ch. 229.053 (1997). The District of Columbia statutes outline establishment of standards for postsecondary education, but not K-12. D.C. CODE ANN. § 31-1601 (1993).

[13] *E.g.* FLA. STAT. ch. 229.512 (1997).

[14] *E.g.* COLO. REV. STAT. ANN. § 22-7-104 (West Supp. 1997), KY. REV. STAT. ANN. § 158.650 (Baldwin 1995), NEV. REV.STAT. § 385.347 (1996), N.M. STAT. ANN. § 22-1-6 (Michie 1993).

[15] MISS. CODE ANN. § 37-1-2 (1996), UTAH CODE ANN. § 53A-1-601 and § 53A-1a-103 (1994).

[16] VA. CODE ANN. § 22.1-253.13:3 (Michie 1997).

[17] N.D. CENT. CODE § 15-20.4-03 (1993).

to legislators and the public. Some form of public reporting was mandated in the following thirty-four states: Alabama, Arkansas, Arizona, California, Colorado, Deleware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin.[18] The increased interest in this form of accountability was demonstrated by the fact that at least nineteen of these states had approved statutes requiring such reporting since 1990. The report card, as it is termed in many states, covered a wide variety of topics including

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[18] ALA. CODE § 16-6B-7 (1995), ARK. CODE ANN. § 6-15-404 (Michie 1993), ARZ. REV. STAT. ANN. § 15-741 (Supp. 1996), CAL. EDUC. CODE § 33126 (West 1993), COLO. REV. STAT. ANN. § 22-7-409 (West Supp. 1997), DEL. CODE ANN. tit. 14, § 124A (Supp. 1996), FLA. STAT. ch. 229.592 (1997), GA. CODE ANN. § 20-2-282 (1996), IDAHO CODE § 33-450 (1995),IND. CODE ANN. § 20-3.1-10-3 (Burns 1996), KY. REV. STAT. ANN. § 158.6453 (Baldwin 1995), LA. REV. STAT. ANN. § 17:391.4 (West 1982), ME. REV. STAT. ANN. tit. 20-A § 6204 (West 1993), MD. CODE ANN., EDUC. § 7-203 (1996), MINN. STAT. ANN. § 126.666 (West 1994), MISS. CODE ANN. § 37-3-53 (1996), MO. ANN. STAT. § 160.522 (Vernon Supp. 1998), NEV. REV. STAT. § 385.347 (1996), N.H. REV. STAT. ANN. § 193-C:1 (Supp. 1996), N.J. STAT. ANN. § 18A:7C-10 (1989), N.M. STAT. ANN. § 21-1-26.6 (Michie 1996), N.C. GEN. STAT. § 115C-12 (1997), OHIO REV. CODE ANN. § 3301.07.14 (Anderson 1997), OKLA. STAT. ANN. tit. 70, § 1210.531 (West 1998), OR. REV. STAT. § 329.115 (1995), S.C. CODE ANN. § 59-30-10 (Law Co-op. 1990), S.D. CODIFIED LAWS ANN. § 13-3-51 (Supp. 1997), TENN. CODE ANN. § 49-1-211 (1996), TEXAS EDUC. CODE ANN. § 39.053 (West 1996), VA. CODE ANN. § 22.1-18 (Michie 1997), VT. STAT. ANN. tit. 16, § 164 (1997), WASH. REV. CODE ANN. § 28A.320.205 (West 1997), W. VA. CODE § 18-2E-4 (Supp. 1997), WIS. STAT. ANN. § 115.38 (West Supp. 1997).

scores on standardized tests,[19] information on student outcomes,[20] progress toward local or state mandated performance goals,[21] and information on faculty and administrators.[22]

In summary, Part I is an analysis of statutes covering broad issues of accountability. Statutes applicable to the individual educator and statutes applicable to institutions providing education were discussed. In ninteen states general accountability for the individual educator was outlined by some type of professional standards or a code of professional conduct. Overall accountability for the educational institution was most often related to expected student achievement or outcomes. Thirty-five states had standards, goals, or objectives of expected student outcomes and nine of those states specified some educational institution component is held generally accountable. There was evidence of a growing demand for public reporting with thirty-four states mandating a state level report card.

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[19] *E.g.* ARK. CODE ANN. § 6-15-404, (Michie 1993), N.M. STAT. ANN. § 22-1-6 (Michie 1996), VA. CODE ANN. § 22.1-253.13:3 (Michie 1997).

[20] *E.g.* ALA. CODE § 16-6B-7 (1995), GA. CODE ANN. § 20-2-282 (1996).

[21] *E.g.* CAL. EDUC. CODE § 33126 (West Supp. 1997), IDAHO CODE § 33-4501 (Supp. 1996), MASS. GEN. LAWS ANN. ch. 69, § 1B (West Supp. 1997), VA. CODE ANN. § 22.1-18 (Michie 1997).

[22] *E.g.* GA. CODE ANN. § 20-2-282 (1996).

Part II--Individual Educators

Educators Defined as Professionals

The standard of care in negligence for an ordinary person is that of the reasonable, ordinary, prudent person under the same or similar circumstances.[23] A higher standard is imposed on professionals because they hold themselves out as having knowledge, skill or intelligence superior to that of the ordinary person.[24] Since the term malpractice represents professional negligence, a key question to determine is whether or not the educator is considered a professional.

There were fifteen states that had statutory language specifically defining teachers or educators as professionals.[25] Those states were Alabama, Florida, Georgia, Indiana, Kansas, Mississippi, Missouri, Nebraska, New Mexico, North Dakota, Pennsylvania, South Dakota, Texas, Utah, and West Virginia. Of those fifteen states, six stated that being declared a profession brings with it all

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[23] W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS, 5th ed. (1984) § 32 at 174-175, (hereinafter PROSSER).

[24] PROSSER, *supra* note 23, at 185.

[25] ALA. CODE § 16-3-3 (1995), FLA. STAT. ch. 231.55 (1997), GA. CODE ANN. § 20-2-791 (1996), IND. CODE ANN. § 20-6.1-1-8 (Burns 1996), KAN. STAT. ANN. § 72-8501 (1992), MISS. CODE ANN. § 37-3-2 (Supp. 1997), MO. ANN. STAT. § 168.011 (Vernon 1991), NEB. REV. STAT. § 79-859 (1996), N.M. STAT. ANN. § 22-10-9 (Michie 1993), N.D. CENT. CODE § 15-38-16 (1993), PA. STAT. ANN. tit. 24, § 11-1101 (1992), S.D. CODIFIED LAWS ANN. § 13-43-16 (1991), TEXAS EDUC. CODE ANN. § 21.031 (West 1996), UTAH CODE ANN. § 53A-7-102 (1994), W. VA. CODE §18A-1-1 (1997).

the rights, responsibilities, and privileges accorded other legally recognized professions.[26] Others simply charge the profession to accept its professional responsibility[27] or accept responsibility in development and promotion of high standards in areas such as ethics, performance, practice, and conduct.[28]

Although not specifically declaring educators to be professionals, seventeen additional states had statutes that use the term profession or professional when discussing or defining educators. These states included Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Maine, Maryland, Minnesota, Montana, Nevada, North Carolina, Oklahoma, Tennessee, and Wyoming.[29] The statutes in Alaska, Idaho, and North Carolina refer to the "teaching

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[26] FLA. STAT. ch. 231.55 (1997), GA. CODE ANN. § 20-2-791 (1996), KAN. STAT. ANN. § 72-8501 (1992), MO. ANN. STAT. § 168.011 (Vernon 1991), NEB. REV. STAT. § 79-859 (1996), N.M. STAT. ANN. § 22-10-9 (Michie 1993).

[27] *E.g.* N.D. CENT. CODE § 15-38-16 (1993).

[28] *E.g.* S.D. CODIFIED LAWS ANN. § 13-43-16 (1991), TEXAS EDUC. CODE ANN. § 21.031 (West 1996).

[29] ALASKA STAT. § 14.20.370 (1992), CAL. EDUC. CODE § 44225 (West Supp. 1997), COLO. REV. STAT. ANN. § 22-60.5-402 (West Supp. 1997), CONN. GEN. STAT. ANN. § 10-144d (West 1996), DEL. CODE ANN. tit. 14, § 1202 (1993), HAW. REV. STAT. § 302A-501 (Supp. 1996), IDAHO CODE § 33-1252 (1995),IOWA CODE ANN. § 272.1 (West 1996), ME. REV. STAT. ANN. tit. 20-A, § 13013 (West Supp. 1994), MD. CODE ANN., EDUC. § 6-704 (1996), MINN. STAT. ANN. § 125.182 (West 1994), MONT. CODE ANN. § 20-4-106 (1997), NEV. REV. STAT. § 391.011 (1996), N.C. GEN. STAT. § 115C-295.3 (1997), OKLA. STAT. ANN. tit. 70, § 6-101.21 (West 1998), TENN. CODE ANN. § 49-5-5601 (1996), WYO. STAT. § 21-7-102 (1997).

profession"[30] while the "education profession" is referenced in the Tennessee Code.[31] Teachers are considered a "professional employee" by Connecticut, Maryland, Minnesota and Wyoming.[32] Teaching is defined as "any professional service rendered or performed by an educator" in Georgia.[33]

Fourteen states have Professional Standards Boards or Committees involved in the certification or licensure process for teachers.[34] Of these fourteen states only Alabama, Georgia, Indiana, Pennsylvania, and West Virginia had specifically defined educators as professionals.

Certification/Licensure

Certification/licensure was the most consistently covered topic related to the individual educator. All fifty states defined some type of credentialing process that results in receiving a certificate or a license. Only the

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[30] ALASKA STAT. § 14.20.370 (1992), IDAHO CODE § 33-1252 (1995), N.C. GEN. STAT. § 115C-295.3 (1997).

[31] TENN. CODE ANN. § 49-5-5601 (1996).

[32] CONN. GEN. STAT. ANN. § 10-144d (West 1996), MD. CODE ANN., EDUC. § 6-704 (1996), MINN. STAT. ANN. § 125.182 (West 1994), WYO. STAT. § 21-7-102 (1997).

[33] GA. CODE ANN. § 20-2-792 (Supp. 1997).

[34] ALA. CODE § 16-23-16.1 (Supp. 1993), ALASKA STAT. § 14.20.380 (1992), COLO. REV. STAT. ANN. § 22-60.5-401 (West Supp. 1994), CONN. GEN. STAT. ANN. § 10-144d (West 1996), GA. CODE ANN. § 20-2-200 (1996), IND. CODE ANN. § 20-6.1-2-1 (Burns 1996), KY. REV. STAT. ANN. § 161.030 (Baldwin 1995), MD. CODE ANN., EDUC. § 6-702 (1996), NEV. REV. STAT. § 391.011 (1996), N.C. GEN. STAT. § 115C-295.3 (1997), PA. STAT. ANN. tit. 24, §2070.5 (Supp. 1997), W.VA. CODE § 18A-3B-1 (1997), WYO. STAT. § 21-2-801 (1997).

District of Columbia had no specific statutory requirement for some type of credential.

Subtopics analysed within this category included what term was used, how the term was defined, how examinations were used as part of the initial credentialing process, and what requirements existed defining various levels of credentials and the renewal process. Table 4-1 provides a state by state summary of these subtopics.

Use of terms

Statutes in twenty-eight states exclusively use the term certification when referring to the credential needed to teach (see Table 4-1).[35] Eleven states use the term licensure.[36] Of those eleven states, seven have changed the

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[35] ALA. CODE § 16-23-1 (1995), ALASKA STAT. § 14.20.010 (1992), ARIZ. REV. STAT. ANN. § 15-203 (Supp. 1996), DEL. CODE ANN. tit. 14, § 122 (1993), FLA. STAT. ch. 231.15 (1997), GA. CODE ANN. § 20-2-200 (1996), IDAHO CODE § 33-1201 (1995), ILL. ANN. STAT. ch. 105, ¶ 21-1 (Smith-Hurd Supp. 1996), KAN. STAT. ANN. § 72-1388 (1992), KY. REV. STAT. ANN. § 161.030 (Baldwin 1995), LA. REV STAT. ANN. § 17:7 (West Supp. 1997), ME. REV. STAT. ANN. tit. 20A, § 13003 (West 1993), MD. CODE ANN., EDUC. § 6-101 (1996), MONT. CODE ANN. § 20-4-101 (1997), NEB. REV. STAT. § 79-808 (1996), N.H. REV. STAT. ANN. § 186:8 (1989), N.J. STAT. ANN. § 18A:6-38 (1989), N.M. STAT. ANN. § 22-2-2 (Michie 1993 & Supp. 1996), N.C. GEN. STAT. § 115C-295 (1997), N.D. CENT. CODE § 15-36-01 (Supp. 1995), OKLA. STAT. ANN. tit. 70, § 3-104 (West 1998), PA. STAT. ANN. tit. 24, § 12-1201 (1992), R.I. GEN. LAWS § 16-1-5 (1996), S.C. CODE ANN. § 59-5-60 (Law Co-op. 1990), S.D. CODIFIED LAWS ANN. § 13-42-1 (1991), TEXAS EDUC. CODE ANN. § 21.003 (West 1996), UTAH CODE ANN. § 53A-6-101 (1994), WASH. REV. CODE ANN. § 28A.410.010 (West 1997), WYO. STAT. § 21-2-802 (1997).

[36] COLO. REV. STAT. ANN. § 22-60.5-201 (West Supp. 1997), IND. CODE ANN. § 20-6.1-3-1 (Burns 1996), IOWA CODE ANN. § 272.2 (West Supp. 1997), MINN. STAT. ANN. § 125.04 (West 1994), MISS. CODE ANN. § 37-3-2 (Supp. 1997), NEV. REV. STAT

TABLE 4-1 STATE BY STATE SUMMARY OF TOPICS RELATED TO CERTIFICATION / LICENSURE OF TEACHERS

STATE	USE OF TERM			EXAMINATION			Progression/ Renewal
	Certificate	License	Both	Required	Basic Skills	Referenced	
AL	✔			1			
AS	✔					✔	
AZ	✔				✔3		
AR			✔	1			
CA			✔	2	✔		✔
CO		✔		✔			✔
CN			✔			✔	✔
DE	✔					✔	
FL	✔			1	✔		✔
GA	✔			✔	✔		✔
HI	✔						
ID	✔					✔	✔
IL	✔			✔	✔		✔

1. Indicates National Board of Teachers examination required.
2. Statute references use of a national level test.
3. Test only required of non-residents.

Table 4-1--continued

STATE	USE OF TERM			EXAMINATION			Progression/ Renewal
	Certificate	License	Both	Required	Basic Skills	Referenced	
IN		✔		✔	✔		
IO		✔		2			
KS	✔			✔	✔		
KY	✔			✔	✔		
LA	✔			✔	✔		
ME	✔			✔	✔		✔
MD	✔					✔	✔
MA			✔	✔	✔		✔
MI			✔	✔	✔4		✔
MN		✔		✔	✔4		✔
MS		✔		2	✔		
MO			✔			✔	✔
MT	✔					✔	✔

2. Statute references use of a national level test.
4. Required prior to entering or before completion of teacher training.

Table 4-1--continued

STATE	USE OF TERM			EXAMINATION			Progression/ Renewal
	Certificate	License	Both	Required	Basic Skills	Referenced	
NE	✔			✔	✔		✔
NV		✔				✔	✔
NH	✔					✔	
NJ	✔					✔	
NM	✔					✔	
NY			✔				✔
NC	✔			1			
ND	✔					✔	
OH	✔					✔	✔
OK	✔						
OR		✔				✔	✔
PA	✔			2			✔
RI	✔					✔	

1. Indicates National Board of Teachers examination required.
2. Statute references use of a national level test.

Table 4-1--continued

STATE	USE OF TERM			EXAMINATION			Progression/ Renewal
	Certificate	License	Both	Required	Basic Skills	Referenced	
SC	✔			1			
SD	✔					✔	✔
TN			✔	✔	✔		✔
TX	✔					✔	✔
UT	✔			"may"			
VT		✔				✔	
VA		✔		✔			
WA	✔			✔	✔		
WV			✔	✔	✔		✔
WI		✔				✔	
WY	✔			"may"			

1. Indicates National Board of Teachers examination required.
2. Statute references use of a national level test.

term used from certificate to license within the past ten years.[37] Five states have statutes indicating certification equates with licensure[38] and three states[39] use a mixture of the two terms within the statute. Statutes in Tennessee indicate certification and licensure are separate credentials.[40] West Virginia was unique stating the educator "shall hold a valid teaching certificate licensing him or her to teach. . . ."[41] Because of the variation in terminology used from state to state, subsequent discussion will use the more generic term credential to refer to certification and licensure unless a specific state is being discussed. See Table 4-1 for a listing of the specific term used by each state.

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§ 391.019 (1996), OR. REV. STAT. § 342.121 (1995), TENN. CODE ANN. § 49-5-5603 (1996), VT. STAT. ANN. tit. 16, § 1692 (1989), VA. CODE ANN. § 22.1-299 (Michie 1997), WIS. STAT. ANN. § 118.19 (West Supp. 1997).

[37] Vermont changed in 1989, Virginia and Oregon changed in 1992, Wisconsin changed in 1993, Colorado changed in 1994, Ohio began change in 1996, and Mississippi changed in 1997.

[38] CAL. EDUC. CODE § 44005 (West 1993), CONN. GEN. STAT. ANN. § 10-144o (West 1996), MASS. GEN. LAWS ANN. ch. 71, § 38G (West Supp. 1997), MICH. COMP. LAWS ANN. § 380.1531 (West 1997), MO. ANN. STAT. § 168.021 (Vernon 1991), OHIO REV CODE ANN. § 3301.07 (Anderson 1997).

[39] ARK. CODE ANN. § 6-17-401 (Michie 1993), HAW. REV. STAT. § 302A-602 (Supp. 1996), N.Y. EDUC. LAW § 3004 (McKinney 1995)(discusses requirements for persons applying for "a certificate or license to be a teacher").

[40] *See* TENN. CODE ANN. § 49-5-5203 (1996).

[41] W. VA. CODE § 18A-3-2 (1997).

Examination

Overall thirty-five states currently mandate some type of examination as a part of the credentialing process for educators (see Table 4-1). In most states provision of this examination is a state level function, however, five states specify use of the National Board of Teachers examination for initial certification.[42] Eight other states refer to acceptance of a nationally administered test or cooperation with the national board in development of credentialing standards.[43]

A total of nineteen states mandated testing of an educators proficiency in basic skills such as reading, oral and written communication, and mathematics. Arizona's basic skills testing is specific to those seeking a teaching certificate who are not residents of the state or who received teacher training outside of the state.[44] Nine states incorporate the basic skills testing into the teacher training programs either as part of admission into the

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[42] ALA. CODE § 16-23-16.1 (1995), ARK. CODE ANN. § 6-17-403 (Michie 1993), FLA. STAT. ch. 231.17 (1997), N.C. GEN. STAT. § 115C-296 (1997). *See also* S.C. CODE ANN. § 59-26-30 (Law Co-op. 1990)(outlines requirement for development of additional exams for areas not covered by National Teachers Exam).

[43] *See* CAL. EDUC. CODE § 44292 (West 1993), HAW. REV. STAT. § 302A-802 (Supp. 1996), IOWA CODE ANN. § 272.20 (West 1995), MISS. CODE ANN. § 37-9-11 (Supp. 1997), N.C. GEN. STAT. § 115C-295.2 (1997), OKLA. STAT. ANN. tit. 70, § 6-176 (West Supp. 1994), PA. STAT. ANN. tit. 24, § 2070.5 (Supp. 1997), TENN. CODE ANN. § 49-5-5602 (1996).

[44] *See* ARIZ. REV. STAT. ANN. § 15-533 (Supp. 1997).

program or as a necessary component for successful completion.[45] Thirteen states require examinations for both basic skill proficiency and subject or content area knowledge.[46]

Some states had statutes indicating some form of examination was being used, but there was no specific statutory language defining the testing. For instance Delaware has no statute defining use of an examination for certification, but reference was made to "state standards on pre-professional skills test" in a statute concerning a special teacher institute as an alternative entry method toward certification.[47] A Texas statute referenced "comprehensive examinations", but gave no details.[48] Wisconsin statutes did not define a testing program, but

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[45] CAL. EDUC. CODE § 44252 (West 1993), CONN. GEN. STAT. ANN. § 10-145f (West 1996), LA. REV. STAT. ANN. § 17:7 (West Supp. 1997), MICH. COMP. LAWS ANN. § 380.1531 (West 1997), MINN. STAT. ANN. § 125.05 (West 1994), NEB. REV. STAT. § 79-808 (1996), N.C. GEN. STAT. § 115C-296 (1997), S.C. CODE ANN. § 59-26-30 (Law Co-op. 1990), WASH. REV. CODE ANN. § 28A.410.020 (West 1997). *See infra* notes 62 to 69 for a discussion of competency testing in teacher training.

[46] CAL. EDUC. CODE § 44256 (West 1993), CONN. GEN. STAT. ANN. § 10-145f (West 1996), FLA. STAT ch. 231.17 (1997), GA. CODE ANN. § 20-2-200 (1996), ILL. ANN. STAT. ch. 105, ¶ 21-1a (Smith-Hurd 1993), IND. CODE ANN. § 20-6.1-3-10 (Burns 1996), KY. REV. STAT. ANN. § 161.030 (Baldwin 1995), LA. REV. STAT. ANN. § 17:7 (West Supp. 1997), MASS. GEN. LAWS ANN. ch. 71, § 38G (West Supp. 1997), MICH. COMP. LAWS ANN. § 380.1531 (West 1997), MISS. CODE ANN. § 37-3-2 (Supp. 1997), TENN. CODE ANN. § 49-5-5605 (1996), W.VA. CODE § 18A-3-2a (1997).

[47] DEL. CODE ANN. tit. 14 § 1251 (1993).

[48] TEXAS EDUC. CODE ANN. § 21.048 (West 1996).

reference was made to establishing "procedures for the examination and licensing of teachers. . . ."[49]

Progression/Renewal of credentials

The final credentialing subtopics examined were specification of various levels of certification and requirements for renewal. Statutes dealing with credentialing of educational personnel other than teachers, such as administrators and vocational instructors, were excluded when considering the number of levels or types of certification.

Twenty-four states defined or referenced more than one level of credential for teachers (see Table 4-1).[50] In these states progression was frequently based on years of experience and additional coursework.[51] In Florida,

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[49] WIS. STAT. ANN. § 115.28 (West Supp. 1997).

[50] CAL. EDUC. CODE § 44256 (West 1993), COLO. REV. STAT. ANN. § 22-60.5-201 (West Supp. 1997), FL. STAT. ch. 231.17 (1997), GA. CODE ANN. § 20-2- 200 (1996), HAW. REV. STAT. § 302A-618 (Supp. 1996), IDAHO CODE § 33-1204 (Supp. 1996), MD. CODE ANN., EDUC. § 6-102 (1996), MASS. GEN. LAWS ANN. ch. 71, § 38G (West Supp. 1997), MONT. CODE ANN. § 20-4-106 (1997), NEB. REV. STAT. § 79-808 (1996), N.C. GEN. STAT. § 115C-296 (1997), OR. REV. STAT. § 342.125 (1995), PA. STAT. ANN. tit. 24, § 12-1201 (1992), TENN. CODE ANN. § 49-5-5201 (Supp. 1997), TEXAS EDUC. CODE ANN. § 21.041 (West 1996). Although unique in designating teachers into multiple class levels for credentialing, Hawaii was included in this subtopic for purposes of analysis. *See also infra* notes 51 to 53.

[51] *See e.g.*, CONN. GEN. STAT. ANN. § 10-144o (West 1996), ILL. ANN. STAT. ch.105, ¶ 21-2 to ¶ 21-11.3 (Smith-Hurd 1993 & Supp. 1996), ME. REV. STAT. ANN. tit. 20-A § 13012 to 13014 (West 1993 & Supp. 1996), MO. REV. STAT. § 168.021 (Vernon 1991), OHIO REV. CODE ANN. § 3319.24 to § 3319.28

Nebraska, New Mexico, New York, and West Virginia there was a standard level credential and additional levels were a special or temporary type status.[52] Michigan and Nevada had separate certification for those teaching at elementary and secondary levels.[53]

The most common requirements for renewal were a specified number of years of successful teaching and additional academic coursework alone or in combination with formal inservice training or professional development activities. Of the states with statutorily defined renewal criteria, three required only teaching experience [54] while others required only coursework.[55] Nine states clearly used

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(Anderson 1997).

[52] *See e.g.*, FLA. STAT. ch. 231.17 (1997), NEB. REV. STAT. § 79-808 (1996)(issuing standard, temporary, and substitute certifications), N.M. STAT. ANN. § 22-10-3 (Michie 1993)(issuing standard, substandard, and substitute certificates), N.Y. EDUC. LAW § 3006 (McKinney 1995)(issuing life and temporary), W.VA. CODE § 18A-3-2a (1997)(describing professional, paraprofessional, and other special certificates).

[53] MICH. COMP. LAWS ANN. § 380.1531 (West 1997), NEV. REV. STAT. § 391.031 (1997).

[54] N.C. GEN. STAT. § 115C-296 (b)(1997), OR. REV. STAT. § 342.153 (3)(a)(1995), UTAH CODE ANN. § 53A-6-102 (1)(1994).

[55] *See e.g.*, COLO. REV. STAT. ANN. § 22-60-107 (West Supp. 1997)(requiring completion of six or more semester hours of renewal credit that maintain or improve skills and must be earned within the five-year period prior to the renewal application date), FLA. STAT. ch. 231.24 (1997), IDAHO CODE § 33-1204 (Supp. 1996)(provisional certificates good for three years and renewal premised on completion of eighteen semester hours or twenty-seven quarter hours of professional training).

the combination of years teaching experience and additional academic coursework or in-service training.[56] South Dakota was unique in basing certificate renewal on academic coursework and public or private sector experience related to the applicants field.[57]

In some states the criteria for renewal of credentials was associated with varying levels of credentialing. For example Maine required an increasing number of years of teaching to progress from provisional to professional and master teacher certifications. However, for renewal at each of these levels additional academic study or in-service training was necessary.[58] While most states use the term renewal, California used language that defined maintenance of credentialing with verification at specified intervals.[59]

Teacher Training

With decreased reliance on the locality rule in cases of medical malpractice, legal scholars have suggested national accreditation of training programs and standardized

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[56] COLO. REV. STAT. ANN. § 22-60-107 (West Supp. 1997), CONN. GEN. STAT. ANN. § 10-144o (West 1996), HAW. REV. STAT. § 302A-618 (Supp. 1996), ILL. ANN. STAT. ch.105, ¶ 21-3 to ¶ 21-11.3 (Smith-Hurd 1993 & Supp. 1996), ME. REV. STAT. ANN. tit. 20-A, § 13016 (West 1993), MO. ANN. STAT. § 168.021 (Vernon 1991), PA. STAT. ANN., tit. 24 § 12-1205.1 (1992), TENN. CODE ANN. § 49-5-5203 (1996), W.VA. CODE § 18A-3-3 (1997).

[57] S.D. CODIFIED LAWS § 13-42-3 (Supp. 1997).

[58] *See* ME. REV. STAT. ANN. § 13012 to § 13014 and § 13016 (West 1993 & Supp. 1996).

[59] CAL. EDUC. CODE § 44277 (West Supp. 1997).

curriculum content might be evidence of accepted standards of practitioner knowledge levels. Statutes related to teacher training were analyzed for commonalities of training background for educators that might indicate consistency in what educators should know and be able to do as a result of their professional education. Statutes outlining requirements for accreditation or some type of formal approval of programs were analyzed in Part III with institutional accreditation.[60]

Alaska, Hawaii, Montana, New Jersey, New York, Rhode Island, Utah, and Vermont had no statutes directly discussing teacher training programs. Six other states made peripheral reference to teacher preparation programs or teacher education.[61]

Statutes describing teacher educational preparation programs in the remaining thirty-five states were analyzed using subtopics of the use of competency testing prior to

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[60] *See infra* notes 135 to 145.

[61] FLA. STAT. ch. 231.546 (1997), ME. REV. STAT. ANN. tit. 20-A § 13012 (West 1993 & Supp. 1996)(refers to graduation from approved teacher preparation program in qualifications for teaching certificate), MD. CODE ANN., EDUC. § 6-704 (1996)(Professional Standards and Teacher Education Board responsible for establishing requirements for preparation of teachers), MASS. GEN. LAWS ANN. ch. 71, § 38G (West Supp. 1997)(outlines requirement of graduation from approved college program for preparation), MICH. COMP. LAWS ANN. § 380.1531 (West 1997)(refers to "state board approved teacher education institutions. . . ."), WYO. STAT. § 21-2-801 (1997)(notes one member of Professional Teaching Standards Board must be a faculty member in an approved teacher preparation program).

admission in teacher preparation programs and specific reference to standards related to teacher training and performance.

Competency testing prior to admission

Five states required satisfactory scores on competency testing in basic skills as a requirement for all students prior to entering teacher preparation programs.[62] Colorado and Michigan required passing the basic skills exam before enrolling in the student teaching component of the preparation programs rather than at time of admission.[63] Minnesota stipulated colleges and universities offering approved teacher preparation programs must provide remedial assistance to persons enrolled at that institution who did not achieve a qualifying score.[64] South Carolina made provision for conditional admission for up to one year if the student has not passed the basic skills examination.[65] Washington waived the requirement for persons who have completed a baccalaureate or graduate degree.[66]

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[62] CAL. EDUC. CODE § 44252 (West 1993), CONN. GEN. STAT. ANN. § 10-145f (West 1996), MINN. STAT. ANN. § 125.05 (West 1994 & Supp. 1997), NEB. REV. STAT. § 79-808 (1996), S.C. CODE ANN. § 59-26-30 (Law Co-op. 1990), WASH. REV. CODE ANN. § 28A.410.020 (West 1997). *See also* DEL. CODE ANN. tit. 14, § 1251 (1993).

[63] COLO. REV. STAT. ANN. § 22-60-113 (West 1990), MICH. COMP. LAWS ANN. § 380.1531 (West 1997).

[64] MINN. STAT. ANN. § 125.05 (West 1994 & Supp. 1997).

[65] S.C. CODE ANN. § 59-26-20 (Law Co-op. 1990).

[66] WASH. REV. CODE ANN. § 28A.410.020 (West 1997).

Several other states had statutes related to testing as part of the admission process. Arizona only required basic skills competency testing for non-residents.[67] The Illinois State Board of Education was mandated to develop procedures ensuring students entering teacher education are proficient in the basic skills, but there was no specific stipulation for competency testing.[68] A Tennessee statute referred to submission of a standardized test score as a part of the admission process to teacher training programs, but did not define what that test was to cover.[69]

Specific reference to standards

Statutes dealing with teacher training were analyzed for specific reference to standards of what educators should know or be able to do as a result of their own professional education. Statutes using the term "standards" in reference to approval of training programs were included if specific to the content of the training.[70] No state had statutes actually defining the standards of performance for beginning

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[67] ARIZ. REV. STAT. ANN. § 15-533 (1991)(required passing proficiency examination but did not stipulate non-residents) Laws 1992, ch. 305, § 10 (Supp. 1997)(amended statute to current requirement of non-residents only).

[68] ILL. ANN. STAT. ch. 105, ¶ 21-2b (Smith-Hurd 1993).

[69] TENN. CODE ANN. § 49-5-5602 (1996), *but see* TENN. CODE ANN. § 49-5-5605 (1996)(specifying students desiring to enter the teaching profession must pass a core test measuring several areas including basic communication skills).

[70] *See infra* notes 135 to 145 for analysis of teacher training accreditation.

teachers, but a few annotated codes gave cross-reference to state administrative regulations.[71]

Eight states had statutes that discussed standards associated with preparation or performance of educators.[72] A 1991 Arkansas statute used the most direct language in establishing a task force to "Define standards for what beginning teachers . . . must know and be able to do, with specific reference to content knowledge and pedagogical skills, and the knowledge, skills, and capacity to assume beginning professional roles and responsibilities. . . ."[73] The more typical, non-definitive wording was exemplified by the California Education Code that stated "The Legislature finds and declares that the competence and performance of professional educators depends in part on the quality of their academic and professional preparation. [S]tandards of quality in collegiate preparation complement standards of candidate competence and performance. . . ."[74] It was

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[71] *See e.g.*, KY. REV. STAT. ANN. § 161.030 (Baldwin 1995) (references Teacher Education Standards 704 KY. ADMIN. REGS. 20:001 to 20:032), WASH. REV. CODE ANN. § 28A.410.010 (West 1997)(references WASH. ADMIN. CODE § 780-79A-003 et seq.).

[72] ARK. CODE ANN. § 6-15-1005 (Michie Supp. 1995), CAL. EDUC. CODE § 44370 (West Supp. 1997), GA. CODE ANN. § 20-2-984 (1996), KAN. STAT. ANN. § 72-8505 (1992), MISS. CODE ANN. § 37-3-2 (Supp. 1997), OKLA. STAT. ANN. tit. 70 § 6-185 (West 1998), PA. STAT. ANN. tit. 24, § 1226 (1992), W.VA. CODE § 18A-3B-1 (1997).

[73] ARK. CODE ANN. § 6-15-1005 (Michie Supp. 1995)(a)(4)(A).

[74] CAL. EDUC. CODE § 44370 (West Supp. 1997).

notable that California also holds professional educators at all levels responsible for quality in teacher preparation.[75]

Only Mississippi made direct reference to use of national standards. In that state individuals applying for a standard license are required to have college preparation to teach in accordance with standards set forth by the National Council for Accreditation of Teacher Education or the National Association of State Directors of Teacher Education and Certification.[76]

In summary, Part II was an analysis of statutes related to accountability of the educator as an individual. Statutes were grouped into the topics of defining the educator as a professional, credentialing, and teacher training. Sixteen states clearly indicated the educator is considered a professional while sixteen additional states used the term professional when referring to teachers or educators. Recognition as a professional would be key in establishing the expected legal standard of care.

The most common form of standardization applied to the individual educator was the requirement for some type of credential. Certification and/or licensure was mandated in forty-nine states. Of the thirty-five states requiring some form of testing as part of the credentialing process, ten use or accept a national level examination. The tests

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[75] CAL. EDUC. CODE § 44371 (West Supp. 1997).

[76] MISS. CODE ANN. § 37-3-2 (Supp. 1997).

covered proficiency in basic skills and subject or content area knowledge of the educator. Twenty-two states had more than one level of credential with progression usually based on years of experience and additional academic course work. Teaching experience and additional training, both academic and inservice were required for renewal of the certificate or license.

Part III--Educational Institutions

Accreditation of Institutions

Accreditation standards for institutions have been cited as establishing a standard of care in questions of medical malpractice.[77] For purposes of analysis, state statutes dealing with a formalized approval system for educational institutions were grouped using two institutional levels: K-12 and Postsecondary. Subtopics analyzed within the accreditation category included: 1) basis used for accreditation standards, 2) whether accreditation is mandatory or optional, and 3) applicability to public and nonpublic institutions. Statutes specific to accreditation of teacher training programs were included in this section. Although several different terms were used for the formal approval process in various states, the term

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[77] *See generally* Darling v. Charleston Community Memorial Hospital, 33 Ill.2d. 326, 221 N.E. 2d. 253(1965), *cert. denied,* 383 U.S. 946 (1966), Dickinson v. Mailliard 175 N.W.2d. 588,596 (1970).

accreditation is generally used in this section unless a specific state which uses another term is being discussed.

Arizona, California, Connecticut, Georgia, Hawaii, Illinois, Minnesota, New York, Ohio, Oregon, South Carolina, Utah, and Wisconsin made no direct statutory reference to accreditation of institutions. Sixteen states mentioned or discussed accreditation of K-12 institutions exclusively. Those states included Alabama, Arkansas, Indiana, Iowa, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, Pennsylvania, South Dakota, and Virginia.[78] Statutes in Alaska, Delaware, Florida, Kansas, Massachusetts, Maryland, New Jersy,and North Dakota mentioned or discussed accreditation related exclusively to postsecondary institutions.[79] Finally,

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[78] ALA. CODE § 16-4-14 (1995), ARK. CODE ANN. § 6-15-202 (Michie 1993), IND. CODE ANN. § 20-1-1.2-2 (Burns 1996), IOWA CODE ANN. § 256.11 (West 1996), LA. REV. STAT. ANN. § 17:391.9 (West 1982), ME. REV. STAT. ANN. tit. 20A, § 4511 (West 1993), MICH. COMP. LAWS ANN. § 380.1280 (West 1997), MISS. CODE ANN. § 37-17-6 (Supp. 1997), MO. ANN. STAT. § 161.092 (Vernon 1991), MONT. CODE ANN. § 20-7-102 (1997), NEB. REV. STAT. § 79-703 (1996), N.H. REV. STAT. ANN. § 21-N:1 (1989), N.M. STAT. ANN. § 22-2-2 (Michie 1993 & Supp. 1996), PA. STAT. ANN. tit. 24, § 6705 (1992)(outlines licensing of private academic schools specifically excluding colleges or universities and limited other schools), S.D. CODIFIED LAWS ANN. § 13-1-12.1 (Supp. 1997), VA. CODE ANN. § 22.1-19 (Michie 1997). *See also* KY. REV. STAT. ANN. § 158.685 (Baldwin 1995)(uses term standards), N.H. REV. STAT. ANN. § 21-N:1 (1989)(uses term approval), TEXAS EDUC. CODE ANN. § 11.001 (West 1996) (requires accreditation of school districts rather than individual schools, but was included in the K-12 analysis)

[79] FL. STAT. ch. 231.17 (1997)(outlines requirements for teacher certification including graduation from an accredited higher education institution), KAN. STAT ANN.

eleven states had statutes related to accreditation at both institutional levels. Those states included Colorado, Idaho, Nevada, North Carolina, Oklahoma, Rhode Island, Tennessee, Vermont, Washington, West Virginia, and Wyoming.[80] Table 4-2 provides a state by state summary of the accreditation statutes by institutional level requirements, public versus nonpublic requirements, and mandatory versus optional requirements.

Basis for accreditation standards--K-12 institutions

Performance was the most common basis of accreditation delineated in statutes. Seven states specifically used the term performance or performance-based.[81] The Kentucky Board

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§ 72-1371 (1992), N.J. STAT. ANN. § 18A:68-3 (Supp. 1997), N.D. CENT. CODE § 15-20.4-04 (1993). *See also* ALASKA STAT. § 14.48.010 (1992)(uses term "regulation"), DEL. CODE ANN. tit. 14, § 122 (1993)(requires licensing of institution not incorporated in the State), MASS. GEN. LAWS ANN. ch. 71, § 38G (West Supp. 1997)(requires bachelor's degree from an accredited college or university to receive teacher certification), MD. CODE ANN., EDUC. § 11-202(1996)(requires certificate of approval).

[80] COLO. REV. STAT. ANN. § 22-2-106 and § 22-60-103 (West 1990), IDAHO CODE § 33-114 and § 33-119 (1995), NEV. REV. STAT. § 394.006 (1996), N.C. GEN. STAT. § 115C-12 (1997) and § 116-15 (1994), OKLA. STAT. ANN. tit. 70, § 3-104 and § 3-104.4 (West 1998), R.I. GEN. LAWS § 16-1-5 and § 16-40-1 (1996), TENN. CODE ANN. § 49-7-2006 and § 49-1-201 (19) (1996), VT. STAT. ANN., tit. 16 §§ 165,166, and 176 (Supp. 1997), WASH. REV. CODE ANN. § 28A.305.130 (West 1997), W.VA. CODE § 18-2E-5 and § 18A-3-2a (Supp. 1997), WYO. STAT. § 21-2-304 and § 21-2-402 (1997).

[81] IND. CODE ANN. § 20-1-1.2-2 (Burns 1996), KY. REV. STAT. ANN. § 158.685 (Baldwin 1995), ME. REV. STAT. ANN. tit. 20-A, § 4511 (West 1993), MISS. CODE ANN. § 37-17-6 (Supp. 1997), NEB. REV. STAT. § 79-703 (1996), TEXAS EDUC. CODE ANN. § 39.072 (West 1996), W.VA. CODE § 18-2E-5 (Supp.

Table 4-2 STATE BY STATE SUMMARY OF INSTITUTIONAL ACCREDITATION / APPROVAL REQUIREMENTS

STATE	INSTITUTIONAL LEVEL DISCUSSED IN STATUTE			K-12 INSTITUTIONS		POSTSECONDARY INSTITUTIONS	
	K-12	Post-secondary	Both	Public	Nonpublic	Public	Nonpublic
AL	✔			Mandatory			
AS		✔				Mandatory	
AZ	No formal approval of institutions discussed in statutes						
AR	✔			Mandatory			
CA	No formal approval of institutions discussed in statutes						
CO			✔	Mandatory	Optional	Not specified	
CN	No formal approval of institutions discussed in statutes						
DE		✔					Mandatory
FL		✔				Not specified	
GA	No formal approval of institutions discussed in statutes						
HI	No formal approval of institutions discussed in statutes						
ID			✔	1	1		

1. Mandatory for secondary institutions, optional for elementary institutions.
2. Requires school districts to be accredited.

Table 4-2--continued

STATE	INSTITUTIONAL LEVEL DISCUSSED IN STATUTE			K-12 INSTITUTIONS		POSTSECONDARY INSTITUTIONS	
	K-12	Post-secondary	Both	Public	Nonpublic	Public	Nonpublic
IL	No formal approval of institutions discussed in statutes						
KY	✔			2			
IN	✔			Mandatory			
IO	✔			Mandatory	Mandatory		
KS		✔				Not specified	
KY	✔			2			
LA	✔			Mandatory			
ME	✔			Optional			
MD		✔				Mandatory	Mandatory
MA							
MI	✔			Mandatory			
MN	No formal approval of institutions discussed in statutes						
MS	✔			Mandatory	Optional		

2. Requires school districts to be accredited.

Table 4-2--continued

STATE	INSTITUTIONAL LEVEL DISCUSSED IN STATUTE			K-12 INSTITUTIONS		POSTSECONDARY INSTITUTIONS	
	K-12	Post-secondary	Both	Public	Nonpublic	Public	Nonpublic
MO	✔			Mandatory	Optional		
MT	✔			Mandatory			
NE	✔			Mandatory			
NV			✔		Optional		Optional
NH	✔			Optional	Optional		
NJ		✔					Mandatory
NM	✔			Mandatory	Optional		
NY	No formal approval of institutions discussed in statutes						
NC			✔	Mandatory			Mandatory
ND		✔				Mandatory	Mandatory
OH	No formal approval of institutions discussed in statutes						
OK			✔	Mandatory	Optional		
OR	No formal approval of institutions discussed in statutes						
PA	✔						
RI			✔	Mandatory			Mandatory

Table 4-2--continued

STATE	INSTITUTIONAL LEVEL DISCUSSED IN STATUTE			K-12 INSTITUTIONS		POSTSECONDARY INSTITUTIONS	
	K-12	Post-secondary	Both	Public	Nonpublic	Public	Nonpublic
SC	No formal approval of institutions discussed in statutes						
SD	✔			Mandatory	Mandatory		
TN			✔		Optional	Mandatory	
TX	✔			2			
UT	No formal approval of institutions discussed in statutes						
VT			✔	Mandatory	Mandatory		Mandatory
VA	✔			Mandatory	Optional		
WA			✔	Optional	Optional	Optional	Optional
WV			✔	Mandatory		Not specified	
WI	No formal approval of institutions discussed in statutes						
WY			✔	Mandatory	Mandatory	Mandatory	Mandatory

2. Requires school districts to be accredited.

of Education was mandated to establish "standards which school districts shall meet in student, program, service and operational performance."[82] However, that subsection of the Kentucky statute goes on to specifically state "This section shall *not* create a statutory cause of action for e*ducational malpractice* by students, their parents or guardians."[83]

In the original 1983 version of section 4511 of the Maine Revised Statutes, the subsection outlining specific requirements for accreditation included: "D. The school has a plan of strict accountability for students, teachers and school administrators in meeting high standards of performance and achievement." However, the 1987 amendment repealing and replacing the entire subsection had no such definitive language and requires "D. The school demonstrates a carefully coordinated effort to provide instructional processes which have consistently resulted in a learning environment which promotes excellence."[84]

Colorado, Indiana, Texas, and West Virginia link accreditation standards to student performance on state

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1997).

[82] KY. REV. STAT. ANN. § 158.685 (Baldwin 1995).

[83] *Id.* (Emphasis added).

[84] ME. REV. STAT. ANN. tit. 20-A, § 4511 (West 1983) *amended by* ME. REV. STAT. ANN. tit. 20-A § 4511 (West 1993).

standardized testing.[85] Performance-based accreditation outlined in West Virginia is "a system which measures the performance of each school based on measures of student and school performance including acquisition of student proficiencies as indicated by statewide testing of educational progress."[86]

Student outcome measures were part of the basis for accreditation standards in Virginia.[87] Michigan established standards for six areas of school operations including "school improvement plans and student performance".[88] Section 380.1277 of the Michigan statutes noted the improvement plans must include "goals based on student outcomes for all students" and "determination of whether or not the existing school curriculum is providing pupils with the education and skills needed to fulfill . . . adult roles."[89]

Mississippi and New Hampshire discussed accreditation standards, but did not use performance or student outcomes. Statutes in these two states based the accreditation system

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[85] *E.g.* COLO. REV. STAT. ANN. § 22-2-106 (West Supp. 1997), IND. CODE ANN. § 20-1-1.2-6 (Burns 1996), TEXAS EDUC. CODE ANN. § 39.072 (West 1996), W.VA. CODE § 18-2E-5 (Supp. 1997).

[86] W.VA. CODE § 18-2E-5 (Supp. 1997).

[87] VA. CODE ANN. § 22.1-253.13:3 (Michie 1997).

[88] MICH. COMP. LAWS ANN. § 380.1280 (West 1997).

[89] MICH. COMP. LAWS ANN. § 380.1277 (West 1997) (1) and (2)(c).

on "elements known to be related to instructional effectiveness", but those elements were not defined within the statutory language.[90]

Mandatory accreditation--Public K-12 institutions

Twenty-two states required formal approval of public institutions offering instruction from kindergarten through grade twelve.[91] In Idaho the State Board of Education was required to establish accreditation standards for public secondary schools, but was given the option of developing standards for elementary schools.[92] Iowa and Oklahoma also included prekindergarten levels in the accreditation mandates.[93] Texas Education Code dictated accreditation of

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[90] MISS. CODE ANN. § 37-1-2 (1996), N.H. REV. STAT. ANN. § 21-N:1 (1989)(the term "approval" is used in this state).

[91] ALA. CODE § 16-4-14 (1995), ARK. CODE ANN. § 6-15-202 (Michie 1993), COLO. REV. STAT. ANN. § 22-2-106 (West 1990), IND. CODE ANN. § 20-1-1.2-2 (Burns 1996), IOWA CODE ANN. § 256.11 (West 1996), LA. REV. STAT. ANN. § 17:391.9 (West 1982), MICH. COMP. LAWS ANN. § 380.1280 (West 1997), MISS. CODE ANN. § 37-17-6 (Supp. 1997), MO. ANN. STAT. § 161.092 (Vernon 1991), MONT. CODE ANN. § 20-7-102 (1997), NEB. REV. STAT. § 79-703 (1996), N.M. STAT. ANN. § 22-2-2 (Michie 1993), N.C. GEN. STAT. § 115C-12 (1997), OKLA. STAT. ANN. tit. 70, § 3-104 (West 1998), R.I. GEN. LAWS § 16-1-5 (1996), S.D. CODIFIED LAWS ANN. § 13-33-1 (1991), VT. STAT. ANN. tit. 16, § 165 (Supp. 1997), VA. CODE ANN. § 22.1-19 (Michie 1997), W.VA. CODE § 18-2-6 (Supp. 1997), WYO. STAT. § 21-2-304 (1997). *See also* KY. REV. STAT. ANN. § 158.685 (Baldwin 1995)(requires school districts to be accredited), TEXAS EDUC. CODE ANN. § 11.001 (West 1996)(requires school districts to be accredited).

[92] IDAHO CODE § 33-119 (1995)(secondary schools are defined as 7th to 12th grades and elementary schools are defined as 1st to 6th or 1st to 8th grades).

[93] IOWA CODE ANN. § 256.11 (West 1996), OKLA. STAT. ANN. tit. 70, § 30-104 (West 1998)(accreditation requirement for

school districts rather than individual institutions, but performance was evaluated at both campus and district levels.[94]

Mandatory accreditation--Nonpublic K-12 institutions

Five states required nonpublic schools to meet state established accreditation standards. Iowa mandated accreditation at all levels of instruction while South Dakota only stipulated kindergarten and nursery schools.[95] Idaho required accreditation of private and parochial schools at the secondary level not the elementary level.[96] In Vermont independent schools may provide elementary or secondary education if "approved" or "recognized". Approval may be granted after evaluation by the State Board of Education, but approval may also be granted if the school is accredited by an agency recognized for accrediting purposes by the State Board.[97] Wyoming required licensure of nonpublic schools if "not accredited by a recognized and accepted accrediting agency. . . ."[98]

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elementary, middle and junior high schools must be met no later than June 30, 1999).

[94] TEXAS EDUC. CODE ANN. § 39.072 (West 1996)(defines overall accreditation standards) and § 39.073 (West 1996) (outlines determination of accreditation status).

[95] IOWA CODE ANN. § 256.11 (West 1996), S.D. CODIFIED LAWS ANN. § 13-4-1 (1991).

[96] IDAHO CODE § 33-119 (1995).

[97] VT. STAT. ANN., tit. 16 § 166 (1989 and Supp. 1997).

[98] WYO STAT. § 21-2-401 (1997).

Optional accreditation--Public K-12 institutions

Title 20-A, section 4511 of the Maine Revised Statutes established accreditation requirements for elementary and secondary schools and states "Accreditation standards [are] intended to encourage excellence. . . ."[99] However, section 4512 specified that accreditation is optional.[100] A statute passed in 1986 directed the New Hampshire department of education "to establish a process for measuring and rating . . . and approving schools", but there was no indication of required compliance with this process.[101] The Washington State Board of Education is to accredit public schools if accreditation is applied for, but again there was no language requiring accreditation.[102]

Optional accreditation--Nonpublic K-12 institutions

Ten states statutorily provided for voluntary accreditation of nonpublic K-12 schools.[103] In the

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[99] ME. REV. STAT. ANN. tit. 20-A § 4511 (West 1993).

[100] *Ibid* at § 4512. *See also* ME. REV. STAT. ANN. tit. 20-A § 4517 (West Supp. 1996)(notes provisions of subchapter on accreditation do not apply to the school years beginning fall 1991 through 1997).

[101] N.H. REV. STAT. ANN. § 21-N:1 (1989). (The board of education is given the duty to adopt rules relative to approval.) *See also* N.H. REV. STAT. ANN. § 21-N:9 (1989).

[102] WASH. REV. CODE ANN. § 28A.305.130 (West 1997)(formerly § 28A.04.120 recodified and reenacted 1990).

[103] COLO. REV. STAT. ANN. § 22-2-107 (West 1990), MISS. CODE ANN. § 37-17-7 (1996), MONT. CODE ANN. § 20-7-102 (1997), NEV. REV. STAT. § 394.241 (Supp. 1997), N.H. REV. STAT. ANN. § 186:11 (1989), N.M. STAT. ANN. § 22-2-2 (Michie 1993 & Supp. 1996), OKLA. STAT. ANN. tit. 70, § 3-104 (West 1998),

Mississippi Code the term "accreditation" was used for public schools and the term "approval" was used for nonpublic schools.[104] Nonpublic schools in Montana may request accreditation and will go through the same process as public schools.[105] If applied for, private and parochial schools may be accredited in Oklahoma provided the schools otherwise meet the same standards as the public schools.[106] Similarily, the Washington State Board of Education will accredit nonpublic schools with grades one through twelve if accreditation is applied for, but there was no indication that accreditation is a requirement.[107] New Hampshire also made provisions for approval or disapproval if requested by a nonpublic school.[108] The Nevada statutes outlined minimum standards for operation, but noted accreditation by regional or national accrediting agencies recognized by the United States Department of Education may be accepted as evidence of compliance with the standards.[109]

TENN. CODE ANN. § 49-1-201 (1996), VA. CODE ANN. § 22.1-19 (Michie 1997), WASH. REV. CODE ANN. § 28A.305.130 (West 1997).

[104] MISS. CODE ANN. § 37-17-7 (1996).

[105] MONT. CODE ANN. § 20-7-102 (1997).

[106] OKLA. STAT. ANN. tit. 70 § 3-104 (West 1998).

[107] WASH. REV. CODE ANN. § 28A.305.130 (West 1997).

[108] N.H. REV. STAT. ANN. § 186:11 (1989).

[109] NEV. REV. STAT. § 394.241 (Supp. 1997).

Basis for accreditation standards--Postsecondary institutions

No statutes concerning accreditation of postsecondary institutions clearly defined a basis for standards. Most commonly a state level agency was given the authority to establish minimum standards. For example a Tennessee statute detailed minimum standards such as quality and content of courses, qualification of educational personnel adequate to achieve stated course and program objectives, and various process oriented policies.[110] Maryland used the term "certificate of approval" rather than accreditation. Certification for postsecondary institutions in Maryland is based on findings that "The facilities, conditions of entrance and scholarship, and educational qualifications and standards are adequate and appropriate for . . . the purpose of the institution . . . [and] programs and courses offered. . . ."[111]

Some states accepted accreditation by national or regional accrediting agencies as evidence of compliance with the minimum standards that may have been established by the state level agency.[112] The North Dakota Board of Vocational and Technical Education was to establish minimum standards

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[110] TENN. CODE ANN. § 49-7-2006 (1996).

[111] MD. CODE ANN., EDUC. § 11-202 (1996).

[112] *E.g.*, ALASKA STAT. § 14.48.060 (1992), TENN. CODE ANN. § 49-7-2006 (1996).

and criteria, but required all non-exempt postsecondary institutions to be accredited by a national or regional agency.[113] Nevada will recognize a private postsecondary institution as accredited if it has met the standards of an accrediting body recognized by the U.S. Department of Education.[114]

North Carolina required institutions conducting post-secondary degree activity to be "licensed". Standards for licensure included the stipulation that the substance of what is being offered "may reasonably and adequately achieve the stated objective" and the qualifications of the instructors and other educational personnel "may reasonably insure that the students will receive . . . education consistent with the stated objectives. . . ."[115]

Alaska and Tennessee required approval of higher education institutions, but made no clear distinction if that requirement is for public only or includes nonpublic.[116] These statutes were analysed with the public institutions. The West Virginia Code specifically excluded institutions of

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[113] *See* N.D. CENT. CODE § 15-20.4-03 (1993) *and* N.D. CENT. CODE § 15-20.4-04 (1993). (Notable exempt institutions include state established institutions and private four year institutions established prior to 1977.) N.D. CENT. CODE § 15-20.4-02 (1993).

[114] NEV. REV. STAT. § 394.006 (Supp. 1997).

[115] N.C. GEN. STAT. § 116-15 (1994).

[116] ALASKA STAT. § 14.48.020 (1992), TENN. CODE ANN. § 49-7-2006 (1996).

higher education from the state board of education's duties of accreditation,[117] however, when discussing teacher certification, reference was made to accredited institutions of higher education.[118]

Mandatory accreditation--Public postsecondary institutions

Five states required public postsecondary institutions to be accredited.[119] To operate in Alaska, postsecondary institutions must have valid authorization from the Alaska Commission on Postsecondary Education and must comply with the minimum standards established by the Commission.[120] The Maryland Education Code required a certificate of approval from the Maryland Higher Education Commission.[121] To be an authorized institution, Tennessee required postsecondary institutions to meet minimum standards set by the Tennessee Higher Education Commission,[122] but also noted institutions accredited by an agency approved by the Commission are

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[117] W.VA. CODE § 18-2-6 (Supp. 1997).

[118] W.VA. CODE § 18A-3-2a (1997).

[119] ALASKA STAT. § 14.48.020 (1992), MD. CODE ANN., EDUC. § 11-202 (1996), N.D. CENT. CODE § 15-20.4-04 (1993), TENN. CODE ANN. § 49-7-2004 (1996), WYO. STAT. § 21-2-304 (1997).

[120] ALASKA STAT. § 14.48.020 (1992).

[121] MD. CODE ANN., EDUC. § 11-202 (1996).

[122] TENN. CODE ANN. § 49-7-2006 (1996).

exempt.[123] In Wyoming the State Board of Education prescribed minimum standards for accreditation of all public schools, however, the University of Wyoming and the community colleges are exempt.[124]

Although commonly a state function, some postsecondary institutions in North Dakota are required to be accredited by national or regional accrediting agencies recognized by the United States Department of Education.[125] Additionally in Alaska and Tennessee accreditation by a national or regional accrediting agency is accepted as evidence of compliance with the established state minimum standards.[126]

It should be noted that only Wyoming[127] and North Dakota[128] used the term "accreditation" for the formal approval provided by the state level agency. Alaska and Tennessee provide "authorization" and Maryland gives a "certificate of approval".

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[123] TENN. CODE ANN. § 49-7-2004 and § 49-7-2006(b)(2) and (c)(1996)(outlining what constitutes an approved accrediting agency).

[124] WYO. STAT. § 21-2-304 (1997).

[125] N.D. CENT. CODE § 15-20.4-04 (1993)(requirement limited to vocational and technical institutions).

[126] *E.g.* ALASKA STAT. § 14.48.060 (1992), TENN. CODE ANN. § 49-7-2006 (1996).

[127] *Supra* note 124.

[128] *Supra* note 125.

Optional accreditation--Public postsecondary institutions

A Washington statute describing powers and duties of the state board of education referred to "institutions of higher education within the state which may be accredited", but there was no distinction of applicability to public versus nonpublic institutions.[129]

Mandatory accreditation--Nonpublic postsecondary institutions

Eight states clearly required formal approval of nonpublic postsecondary educational institutions (see Table 4-2). Delaware, New Jersey, North Carolina, and Wyoming required "licensure" for these institutions while Rhode Island and Vermont mandated "approval".[130] In North Dakota statutory language combines public and nonpublic by stating "All postsecondary institutions must be accredited by national or regional accrediting agencies. . . ."[131] With a few very specific nonpublic institutional exceptions, Maryland Education Code required a certificate of approval for all postsecondary institutions.[132]

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[129] *Supra* note 107.

[130] DEL. CODE ANN. tit. 14, § 122 (1993), N.J. STAT. ANN. § 18A:68-3 (Supp. 1997), N.C. GEN. STAT. § 116-15 (1994), R.I. GEN. LAWS § 16-40-1 (1996), VT. STAT. ANN. tit. 16, § 176 (Supp. 1997), WYO. STAT. § 21-2-401 (1997).

[131] *Supra* note 125.

[132] M.D. CODE ANN., EDUC. § 11-202 (1996)(exceptions include certain religious or church institutions and a nonpublic

Optional accreditation--Nonpublic postsecondary institutions

A Nevada statute concerning private educational institutions noted a postsecondary institution is accredited if it has met the standards of a nationally recognized accrediting body, but nothing in the statute indicated accreditation was required.[133] A Wyoming statute concerning private schools stated "The state board of education may license . . . all post secondary education institutions not accredited by a recognized and accepted accrediting agency. . . ."[134]

Formal Approval--Teacher Training

A total of thirty-two states had statutory language related to some type of standardized control of teacher education. Those states included Alabama, California, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Twenty-seven of those states used the term "approval" and specify

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institution chartered by the General Assembly).

[133] NEV. REV. STAT. § 394.006 (Supp. 1997).

[134] WYO.STAT. § 21-2-401 (1997).

the approval is by some state level organization.[135] Where defined by statute, the approval criteria were most often related to curricular content,[136] student teaching,[137] and performance of graduates.[138]

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[135] ALA. CODE § 16-23-2 (1995), FLA. STAT. ch. 231.17 (1997), GA. CODE ANN. § 20-2-984 (1996), IDAHO CODE § 33-114 (1995), IND. CODE ANN. § 20-1-1.4-2 (Burns 1996), IOWA CODE ANN. § 272.25 (West 1996), KY. REV. STAT. ANN. § 161.030 (Baldwin 1995), LA. REV. STAT. ANN. § 17:7.2 (West Supp. 1997), ME. REV. STAT. ANN. § 13012 (West 1993), MASS. GEN. LAWS ANN. ch. 71, § 38G (West Supp. 1997), MICH. COMP. LAWS ANN. § 380.1531 (West 1997), MINN. STAT. ANN. § 125.05 (West 1994 & Supp. 1997), MISS. CODE ANN. § 37-3-2 (Supp. 1997), MO. ANN. STAT. § 161.097 (Vernon 1991), NEB. REV. STAT. § 79-808 (1996), NEV. REV. STAT. § 391.037 (1996), N.C. GEN. STAT. § 115C-296 (1997), N.D. CENT. CODE § 15-38-18 (1993), OHIO REV. CODE ANN. § 3319.23 (Anderson 1997), OR. REV. STAT. § 342.120 (1995), PA. STAT. ANN. tit. 24, § 1225 (1992), S.C. CODE ANN. § 59-26-20 (Law Co-op. 1990), TENN. CODE ANN. § 49-5-5602 (1996), TEXAS EDUC. CODE § 21.045 (West 1996), VA. CODE ANN. § 22.1-298 (Michie 1997), WASH. REV. CODE ANN. § 28A.305.130 (West 1997), W.VA. CODE § 18A-3-1 (1997), WIS. STAT. ANN. § 115.28 (West Supp. 1997), WYO. STAT. § 21-2-801 (1997). The predominate approval bodies are State Boards of Education, Professional Standards Boards, and Teacher or Education Standards and Practices Boards. *See also* N.Y. EDUC. LAW § 3001 (McKinney 1995)(mentions approved teacher education program, but no further definition is provided).

[136] *See e.g.*, IND. CODE ANN. § 20-6.1-2-1 (Burns 1996), KY. REV. STAT. ANN. § 161.030 (Baldwin 1995), MO. ANN. STAT. § 161.099 (Vernon Supp. 1998), NEV. REV. STAT. § 391.038 (1996).

[137] *See e.g.*, LA. REV. STAT. ANN. § 17:7.2 (West 1982), S.C. CODE ANN. § 59-26-20 (Law Co-op. 1990), W.VA. CODE § 18A-3-1 (1997).

[138] *See e.g.*, TENN. CODE ANN. § 49-5-5607 (1996), TEXAS EDUC. CODE ANN. § 21.045 (West 1996).

Five states used the term "accreditation" of teacher training programs or institutions housing those programs.[139] Of those five states only Missouri discussed accreditation at a national level noting institutions are not required to meet national or regional accreditation, but such accreditation may be accepted in lieu of state approval if standards are at least as stringent as those set at the state level.[140] The state board of education in Nevada approves teacher education programs, but may recognize as acceptable programs accredited by the National Council of Accreditation of Teacher Education.[141] Texas, Indiana, and Oklahoma used both terms with no indication that approval and accreditation are different processes.[142] California specifically stated the system of accreditation of educator preparation shall "[h]old professional elementary,

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[139] CAL. EDUC. CODE § 44371 (West Supp. 1997), IND. CODE ANN. § 20-6.1-2-2 (Burns 1996), KAN. STAT. ANN. § 72-1371 (1992), MO. ANN. STAT. § 161.097 (Vernon 1991), TEXAS EDUC. CODE § 21.045 (West 1996).

[140] MO. ANN. STAT. § 161.097 (Vernon 1991).

[141] NEV. REV. STAT. § 391.038 (1996).

[142] *See e.g.*, IND. CODE ANN. § 20-6.1-2-2 (Burns 1996)(using the terms "accedited schools" and "approved courses" related to teacher training), OKLA. STAT. ANN. tit. 70, § 6-184 (West 1998)(provides authority for approval and accreditation of teacher education programs), TEXAS EDUC. CODE § 21.045 (West 1996)(discusses "review [of] accreditation status of each educator preparation program" and establishes "standards to govern the approval . . . of all educator preparation programs. . . .")

secondary, and postsecondary educators responsible for quality in the preparation of professional practitioners."[143]

Two other states defined some type of formal approval, but did not use the terms "accreditation" or "approval". Delaware required any individual public or private educational institution to first gain the consent of the Board of Education if the institution is offering teacher training courses leading to certification.[144] A Tennessee statute discussed revocation of certification for any public or private teacher training institution if 30% or more students fail the state teachers examination in two consecutive years.[145]

In summary, Part III was the analysis of statutes related to the predominant form of institutional accountability - accreditation. Thirty-four states made statutory reference to accreditation. Seventeen of the thirty-four deal with K-12 only, ten address postsecondary institutions only, and seven states had statutes referencing both K-12 and postsecondary institutions. Analysis was subdivided into K-12 institutions and postsecondary institutions.

For K-12 institutions, the most common criteria for accreditation was some type of performance such as student

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[143] CAL. EDUC. CODE § 44371 (West Supp. 1997).

[144] DEL. CODE ANN. tit. 14, § 122 (1993).

[145] TENN. CODE ANN. § 49-5-5607 (1996).

performance on state standardized tests or pre-established general school level performance. A closely related term used to establish performance was student outcomes measures. Twenty states required K-12 public institutions to be accredited. An additional three states made accreditation optional for public institutions. Accreditation for nonpublic K-12 institutions was mandatory in four states and optional in seven other states.

For postsecondary institutions, there were no clearly defined criteria in the statutory language. State level agencies were given authority to establish minimum standards. Five states indicated accreditation by national or regional accrediting bodies was acceptable as evidence of compliance with state established standards. Public postsecondary institutions were required to be accredited in five states with the option outlined in one additional state. Accreditation of nonpublic postsecondary institutions was mandatory in six states and optional in two states.

The final component of Part III was an analysis of statutes dealing with accreditation of teacher training. Thirty states had statutory language mandating some type of standardized control of teacher education. The basis of approval was most often related to curriculum, student teaching, and performance of graduates. None of the states required accreditation at the national level. However, two

states indicated recognition by a national accrediting body may be accepted in lieu of state approval.

Part IV--Standardized Testing

In medical malpractice the professional healthcare provider has a duty to carry out a proper evaluation and make a logical diagnosis.[146] Standardized testing of students is a method for educators to identify students with actual or potential academic problems.

Alaska, Hawaii, Iowa, Minnesota, Montana, New York, North Dakota, Pennsylvania, and Wyoming had no direct statutory reference to standardized testing of students.[147] Idaho had passing reference to "scores on applicable statewide tests" in a statute defining requirements for a state report card, but no statute outlined the testing program.[148] Nebraska statutes indicated the state was in initial stages of developing a system of assessing learner outcomes.[149] Although no specific testing program was defined, Hawaii had mandated development of statewide performance standards and school-by-school assessment of

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[146] *See e.g.*, Rostron v. Klein,178 N.W.2d. 675 (1970)(duty to take a proper medical history), Lambert v. Michel, 364 So.2d. 248 (1978)(duty to properly use laboratory and ancillary procedures), Steeves v. United States, 294 F. Supp. 446 (D.C.S.C. 1968).

[147] Statutes outlining Minnesota's planning, evaluation, and reporting process were repealed in 1993. No other testing program has been defined as of the 1996 Regular Session.

[148] IDAHO CODE § 33-4501 (Supp. 1996).

[149] NEB. REV. STAT. § 79-753 (1996).

educational outcomes were to be included in an educational status report.[150]

The remaining thirty-nine states outlined some type of standardized testing program. This category was analyzed using the subtopics of purpose of the testing program, the basis of the test, requirement of passing scores for grade level promotion and high school graduation, subjects commonly tested, and participation by nonpublic schools. The majority of standardized testing programs were for K-12, but a few states also define standardized testing at the higher education level. These will be discussed separately.

Purpose of Testing

Of the thirty-four states that defined a purpose for the standardized testing programs, thirty specified it was to measure mastery or competency in educational skills and knowledge or to measure academic progress (see Table 4-3). Those states included Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Maine, Massachusetts, Mississippi, Missouri, Nevada, New Mexico, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.[151] The stated intent within the statutes was

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[150] HAW. REV. STAT. § 302A-1004 (Supp. 1996).

[151] ARK. CODE ANN. § 6-15-402 (Michie 1993), ARZ. REV. STAT. ANN. § 15-741 (Supp. 1996), CAL. EDUC. CODE § 60604 (West Supp. 1997), COLO. REV. STAT. ANN. § 22-7-409 (West Supp.

TABLE 4-3 STATE BY STATE SUMMARY OF STANDARDIZED TESTING REQUIREMENTS

STATE	SUBJECT AREAS TESTED				PASSING SCORE		PURPOSE OF TESTING		
	Reading	Math	Writing	Science	Grade to Grade	Graduate Highschool	MASTERY/ COMPETENCY	Assist Student	Assist School
AL	Subject areas not specified								✔
AS	No testing specified in statutes								
AZ	✔	✔	✔	✔	Required		✔		
AR		✔				Required	✔		✔
CA		✔				Required	✔	✔	✔
CO	✔	✔	✔	✔	Required		✔	✔	
CN	✔	✔					✔		
DE	✔	✔					✔		
FL	✔	✔	✔			Required		✔	
GA	✔	✔	✔	✔	Required	Required	✔		✔
HI	Testing referenced in statutes, but no specifics outlined								
ID	Testing referenced in statutes, but no specifics outlined								
IL	✔	✔	✔	✔					
IN		✔		✔		Used	✔	✔	✔
IO	No testing specified in statutes								

Table 4-3--continued

STATE	SUBJECT AREAS TESTED				PASSING SCORE		PURPOSE OF TESTING		
	Reading	Math	Writing	Science	Grade to Grade	Graduate Highschool	MASTERY/ COMPETENCY	Assist Student	Assist School
KS	✔	✔			Used			✔	✔
KY	✔	✔	✔	✔			✔		✔
LA	✔	✔	✔		Used				
ME	✔	✔	✔				✔	✔	
MD	✔	✔	✔		Required				✔
MO	✔	✔	✔	✔			✔		
MT	No testing specified in statutes								
NE	✔	✔		✔			✔		
NV	✔	✔	✔			Required	✔	✔	
NH	✔	✔							✔
NJ	✔	✔	✔			Required	✔	✔	
NM	✔	✔		✔	Required	Required	✔		✔
NY	No testing specified in statutes								
NC	✔	✔				Used	✔	✔	✔
ND	No testing specified in statutes								
OH	✔	✔	✔	✔			✔		

Table 4-3--continued

STATE	SUBJECT AREAS TESTED				PASSING SCORE		PURPOSE OF TESTING		
	Reading	Math	Writing	Science	Grade to Grade	Graduate Highschool	MASTERY/ COMPETENCY	Assist Student	Assist School
OK	✔	✔		✔			✔	✔	
OR		✔		✔			✔		
PA	No testing specified in statutes								
RI	Subject areas not specified						✔		
SC	✔	✔	✔	✔		Required		✔	
SD			✔					✔	
TN	✔	✔				Required	✔		
TX	✔	✔	✔	✔		Required	✔	✔	
UT	Subject areas not specified						✔		
VT	Subject areas not specified					Required	✔		
VA	✔	✔	✔		Required	Required	✔		✔
WA	✔	✔					✔	✔	
WV	Subject areas not specified						✔	✔	
WI	✔	✔	✔	✔			✔	✔	
WY	No testing specified in statutes								

grouped into those looking at student performance from the broad institutional level and those more specific to the individual student. It must be noted that most states had more than one purpose outlined (see Table 4-3).

At the institutional level twelve states used standardized testing as part of accountability by assessing "school performance" or "effectiveness of schools". These states included Alabama, Arkansas, California, Georgia, Indiana, Kentucky, Maryland, Massachusetts, Mississippi, New Mexico, North Carolina, and Virginia.[152] Alabama, Indiana,

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1997), CONN. GEN. STAT. ANN. § 10-14n (West 1996), DEL. CODE ANN. tit. 14, § 122 (1993), FL. STAT. ch. 229.57 (1997), GA. CODE ANN. § 20-2-281 (1996), IND. CODE ANN. § 20-10.1-16-5 (Burns 1996), KY. REV. STAT. ANN. § 158.6453 (Baldwin 1995), ME. REV. STAT. ANN. tit. 20-A, § 6201 (West 1993), MASS. GEN. LAWS ANN. ch. 69, § 1D (West 1996), MISS. CODE ANN. § 37-16-3 (1996), MO. ANN. STAT. § 160.518 (Vernon Supp. 1998), NEV. REV. STAT. § 389.015 (1996), N.J. STAT. ANN. § 18A:7C-6 (1989), N.M. STAT. ANN. § 22-2-8.5 (Michie 1993), N.C. GEN. STAT. § 115C-174.11 (1997), OHIO REV. CODE ANN. § 3301.07.10 (Anderson 1997), OKLA. STAT. ANN. tit. 70, § 1210.508 (West 1998), OR. REV. STAT. § 329.485 (1995), R.I. GEN. LAWS § 16-22-9 (1996), S.D. CODIFIED LAWS ANN. § 13-3-55 (Supp. 1997), TENN. CODE ANN. § 49-1-608 (Supp. 1997), TEXAS EDUC. CODE ANN. § 39.023 (West 1996), UTAH CODE ANN. § 53A-1-601 (1994), VT. STAT. ANN. tit. 16, § 179 (Supp. 1997), VA. CODE ANN. § 22.1-253.13:3 (Michie 1997), WASH. REV. CODE ANN. § 28A.230.190 (West 1997), W.VA. CODE § 18-2E-2 (Supp. 1997), WIS. STAT. ANN. § 118.30 (West Supp. 1997).

[152] ALA. CODE § 16-6B-3 (1995), ARK. CODE ANN. § 6-15-402 (Michie 1993), CAL. EDUC. CODE § 60601 (West 1989), GA. CODE ANN. § 20-2-281 (1996), IND. CODE ANN. § 20-10.1-16-5 (Burns 1996), KY. REV. STAT. ANN. § 158.6453 (Baldwin 1995), MD. CODE ANN., EDUC. § 7-202 (1996), MASS. GEN. LAWS ANN. ch. 69, § 1I (West Supp. 1997), MISS. CODE ANN. § 37-16-1 (1996), N.M. STAT. ANN. § 22-2-8.5 (Michie 1993), N.C. GEN. STAT. § 115C-174.10 (1997), VA. CODE ANN. § 22.1-253.13:3 (Michie 1997).

Kentucky, and West Virginia used test results to compare state student performance and achievement with national levels.[153] Arkansas, California, Kansas, and New Hampshire indicated the intent of testing was to "improve instruction".[154]

A more narrow focus of assessment of the individual student was noted in several statutes. The assessment program in Texas is "to ensure school accountability of student achievement."[155] In Wisconsin the testing program was to be "designed to assess individual pupil progress. . . ."[156] Statutory language in California, Florida, Kansas, Nevada, New Jersey, North Carolina, Oklahoma, South Carolina, and Washington indicated the tests were to be used to identify the need for remedial instruction.[157] Indiana, Maine, Massachusetts, Oklahoma, and South Carolina actually specified standardized testing was

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[153] ALA. CODE § 16-6B-3 (1995), IND. CODE ANN. § 20-10.1-16-5 (Burns 1996), KY. REV. STAT. ANN. § 158.6453 (Baldwin 1995), W.VA. CODE § 18-2E-2 (Supp. 1997).

[154] *E.g.* ARK. CODE ANN. § 6-15-402 (Michie 1993), CAL. EDUC. CODE § 60601 (West 1989), KAN. STAT. ANN. § 72-9401 (1992), N.H. REV. STAT. ANN. § 193-C:3 (Supp. 1997).

[155] TEXAS EDUC. CODE ANN. § 39.022 (West 1996).

[156] WIS. STAT. ANN. § 118.30 (West 1991).

[157] CAL. EDUC. CODE § 51216 (West Supp. 1997), FLA. STAT. ch. 229.57 (1997), KAN. STAT. ANN. § 72-9401 (1992), NEV. REV. STAT. § 389.015 (1996), N.J. STAT. ANN. § 18A:7C-6.2 (Supp. 1996), N.C. GEN. STAT. § 115C-174.11 (1997), OKLA. STAT. ANN. tit. 70, § 1210.508 (West 1998), S.C. CODE ANN. § 59-30-10 (Law Co-op. 1990), WASH. REV. CODE ANN. § 28A.230.190 (West 1997).

to be used for diagnosing or determining individual student needs.[158] Statutes relating to grade level progression and graduation were analyzed separately.[159]

Basis of Test

In most states the statutory language discussed some type of norm-referenced or criterion-referenced testing program, but these states varied in whether the base line was established at the local, state, or national level. For purposes of this analysis, norm- versus criterion-referenced tests were not mutually exclusive because a few states use a combination. Delaware, Illinois, Michigan, and Nevada did not specify what type of test was to be used.

A total of twelve states mandated the use of norm-referenced tests. Alabama, Arizona, Arkansas, Florida, Georgia, Kentucky, Louisiana, Texas, Virginia, and West Virginia specified using a nationally norm-referenced test[160]

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[158] IND. CODE ANN. § 20-10.1-16-5 (Burns 1996), ME. REV. STAT. ANN. tit. 20-A, § 6201 West 1993), MASS. GEN. LAWS ANN. ch. 69, § 1I (West Supp. 1997), OKLA. STAT. ANN. tit. 70, § 1210.508 (West 1998), S.C. CODE ANN. § 59-30-10 (Law Co-op. 1990). *But see* CAL. EDUC. CODE § 60601 West Supp. 1994)(stating legislative intent is for system of individual assessment of pupils, but primary purpose is improvement of instruction).

[159] *See infra* notes 162 to 169.

[160] ALA. CODE § 16-6B-1 (1995), ARZ. REV. STAT. ANN. § 15-741 (Supp. 1997), ARK. CODE ANN. § 6-15-403 (Michie 1993), FLA. STAT. ch. 229.57 (1997), GA. CODE ANN. § 20-2-281 (1996), LA. REV. STAT. ANN. § 17:24.4 (West Supp. 1998), TEXAS EDUC. CODE ANN. § 39.023 (West 1996), VA. CODE ANN. § 22.1-253.13:3 (Michie 1997). *See also* KY. REV. STAT. ANN. § 158.6453 (Baldwin 1995) and W.VA. CODE ANN. § 18-2E-2

while Oklahoma and Utah[161] gave no indication of the normative level.

Statutes in twenty-one states indicated testing was to be based on some type of established criterion such as proficiency and minimum performance. States with this test basis included Alabama, California, Connecticut, Florida, Illinois, Indiana, Louisiana, Massachusetts, Mississippi, Missouri, New Jersey, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, and Wisconsin.[162] Alabama, Louisiana, and Oklahoma specified criterion set by grade level.[163] Colorado, Florida, Illinois, Indiana, Kansas, Kentucky,

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(Supp. 1997)(both statutes requiring use of National Assessment of Educational Progress program).

[161] OKLA. STAT. ANN. tit. 70 § 1210.508 (West 1998), UTAH CODE ANN. § 53A-11-602 (1994).

[162] ALA. CODE § 16-6B-2 (1995), CAL. EDUC. CODE § 60601 (West 1989), CONN. GEN. STAT. ANN. § 10-14n (West 1996), FLA. STAT. ch. 229.57 (1997), ILL. ANN. STAT. ch. 105, ¶ 2-3.64 (Smith-Hurd Supp. 1996), IND. CODE ANN. § 20-10.1-16-7 (Burns 1996), LA. REV. STAT. ANN. § 17:391.4 (West Supp. 1996), MASS. GEN. LAWS ANN. ch. 69, § 1I (West Supp. 1997), MISS. CODE ANN. § 37-16-3 (1996), MO. ANN. STAT. § 160.257 (Vernon 1991), N.J. STAT. ANN. § 18A:7C-2 (Supp. 1996), OHIO REV. CODE ANN. § 3301.07.10 (Anderson 1997), OKLA. STAT. ANN. tit. 70, § 1210.508 (West 1998), OR. REV. STAT. § 329.485 (1995), S.C. CODE ANN. § 59-30-10 (Law Co-op. 1990), S.D. CODIFIED LAWS ANN. § 13-3-55 (Supp. 1997), TEXAS EDUC. CODE ANN. § 39.024 (West 1996), VT. STAT. ANN. tit. 16, § 179 (Supp. 1997), VA. CODE ANN. § 22.1-253.13:3 Michie 1997), WASH. REV. CODE ANN. § 28A.230.190 (West 1997), WIS. STAT. ANN. § 118.30 (West 1991).

[163] ALA. CODE § 16-6B-3 (1995), LA. REV. STAT. ANN. § 17:391.4 (West Supp. 1996), OKLA. STAT. ANN. tit. 70, § 1210.508 (1998).

Michigan, New Hampshire, New Jersey, and Texas referenced state established goals or standards as the basis of comparison.[164]

Requirement for Passing Score

Not all states that have testing programs required a specific score considered to be passing. Of the thirty-eight states outlining standardized testing programs, twenty indicated some type of minimum acceptable score was necessary for grade to grade promotion and/or high school graduation (see Table 4-3). Fourteen states indicated a passing score was a requirement for high school graduation including Arkansas, California, Florida, Georgia, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New Mexico, South Carolina, Tennessee, Texas, and Vermont.[165]

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[164] COLO. REV. STAT. ANN. § 22-7-407 (West Supp. 1997), FL. STAT. ch. 229.57 (1997), ILL. ANN. STAT. ch. 105 ¶ 2-3.64 (Smith-Hurd Supp. 1996), IND. CODE ANN. § 20-10.1-16-4 (Burns 1996), KAN. STAT. ANN. § 72-9404 (1992), KY. REV. STAT. ANN. § 158.6453 (Baldwin 1995), MICH. COMP. LAWS § 380.1279 (West 1997), N.H. REV. STAT. ANN. § 193-C:3 (Supp. 1996), N.J. STAT. ANN. § 18A:7C-6 (1989), TEXAS EDUC. CODE ANN. § 39.024 (West 1996).

[165] ARK. CODE ANN. § 6-15-407 (Michie 1993), FLA. STAT. ch. 229.57 (1997), GA. CODE ANN. § 20-2-281 (1996), MASS. GEN. LAWS ANN. ch. 69, § 1D (West 1996), MICH. COMP. LAWS ANN. § 380.1279 (West 1997), MISS. CODE ANN. § 37-16-7 (1996), NEV. REV. STAT. § 389.015 (1996), N.J. STAT. ANN. § 18A:7C-1 (Supp. 1996), N.M. STAT. ANN. § 22-2-8.4 (Michie 1993 & Supp. 1997), S.C. CODE ANN. § 59-30-10 (Law Co-op. 1990), TENN. CODE ANN. § 49-6-6001 (1996), TEXAS EDUC. CODE ANN. § 39.025 (West 1996), VT. STAT. ANN. tit. 16, § 179 (Supp. 1997). *But see* CAL. EDUC. CODE § 51217 (West Supp. 1998) (subsection (a)indicating the student shall not receive high school diploma if standards of proficiency in basic skills have not been met). (However, subsection (c) states "Nothing in this section shall be construed to authorize or permit

It was notable that Massachusetts required satisfaction of competency determinations for high school graduation, but the statute specified "Nothing in this section shall be construed to provide a parent . . . or student . . . with a *cause of action for educational malpractice* if the student fails to obtain a competency determination."[166] Arizona, Georgia, and Maryland signified some minimum acceptable score was necessary for grade to grade promotion.[167] Colorada required students generally must pass the literacy examination for promotion from 3rd to 4th grade.[168] New Mexico and Virginia stipulated both grade to grade promotion and high school diploma depended on passing scores.[169]

Some states used scores for graduation determinations, but passing scores were not required. North Carolina General Statutes stated tests may be used to assure high school graduates "possess skills and knowledge", but the

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the State Board of Education to adopt statewide minimum proficiency for high school graduation.")

[166] MASS. GEN. LAWS ANN. ch. 69, § 1D (i)(West 1996) (emphasis added).

[167] ARIZ. REV. STAT. ANN. § 15-741 (Supp. 1996), GA. CODE ANN. § 20-2-281 (1996), MD. CODE ANN., EDUC. § 7-202 (1996).

[168] COLO. REV. STAT. ANN. § 22-7-504 (West Supp. 1997).

[169] N.M. STAT. ANN. § 22-2-8.4 (Michie 1993)(passing state competency examination required for high school diploma) and N.M. STAT. ANN. § 22-2-8.6 (Michie 1993 & Supp. 1997) (mastery of essential competencies necessary for entering next higher grade), VA. CODE ANN. § 22.1-253.13:4 (Michie 1997). *But see Id.* noting student may receive a certificate if requirements for diploma are not met.

statute did not specify students must actually pass the tests.[170] Indiana required students to meet "[t]he educational proficiency standard tested in the graduation examination", but also provided for waiver of those requirements under some conditions.[171] Kansas and Louisiana used the more permissive terminology indicating test scores may be considered in grade to grade promotion.[172] Arkansas, Connecticut, Ohio, and Utah statutes specifically mandated students may not be denied promotion or graduation solely because of failure to attain a specified score on standardized tests.[173] The Maryland Code stated failure to meet grade level expectation "may not be the sole reason for withholding grade advancement more than once in grades 2 through 7." [174] Nevada specified scores may not be used for grade to grade promotion, but passing scores are required for high school graduation.[175]

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[170] § 115C-174.11 (1997).

[171] IND. CODE ANN. § 20-10.1-16-13 (Burns 1996).

[172] KAN. STAT. ANN. § 72-9403 (1992) (legislature is to consider utilization of exam results as determinants for promotion and graduation), LA. REV. STAT. § 17:24.4 (West Supp. 1996)(student proficiency may be considered in promotion, but policy is up to local school board).

[173] ARK. CODE ANN. § 6-15-403 (Michie 1993), CONN. GEN. STAT. ANN. § 10-14n (West 1996), OHIO REV. CODE ANN. § 3301.07.11 (Anderson 1997), UTAH CODE ANN. § 53A-1-609 (1994).

[174] MD. CODE ANN., EDUC. § 7-202 (1996).

[175] NEV. REV. STAT. § 389.015 (Supp. 1997).

Subject Areas Tested

Only Rhode Island and Utah had no statutory reference to specific subject areas to be included in the mandated standardized testing program. The remaining thirty-four states defined a variety of subject areas and skills. Table 4-3 lists the states with mandated testing and summarizes subject areas to be tested.

The most consistently listed subjects to be evaluated were those considered to be the basic skills of reading, writing, and mathematics. Twenty-nine states specified testing was to include reading and thirty-four states specified mathematics. Writing skills were to be tested in nineteen states. The broader terms of language, language arts, communication, communication arts, and English were used in statutes of twelve states.

Outside of the basic skills, science was the next most frequently defined area to be tested and was mandated in sixteen states. Other subject areas specified in testing programs included social studies, history, geography, civics and government. In Arkansas, Florida, and Texas skills in higher order thinking or problem-solving were to be included in testing.[176]

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[176] ARK. CODE ANN. § 6-15-402 (Michie 1993), FL. STAT. ch. 229.57 (1997), TEXAS EDUC. CODE ANN. § 39.023 (West 1996).

Testing in Nonpublic Schools

Participation in state standardized testing programs was addressed in a total of eight states. Statutes in New Hampshire, North Carolina, Ohio and Rhode Island indicated private schools may participate on a voluntary basis.[177] Kansas and West Virginia required nonpublic schools to be a part of the testing program.[178] Maine permitted private schools approved for attendance to take part in the state testing program,[179] but required testing in private schools where student enrollment included at least 60% publicly-funded students.[180]

Testing in Higher Education

As noted previously, most statutes addressing standardized testing of students are intended for K-12. Only two states mandated standardized testing at the post-secondary level.

In 1989 Arkansas implemented an assessment program to begin Fall semester of 1991. Each state-supported institution was to evaluate student learning of general

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[177] N.H. REV. STAT. ANN. § 193-C:6 (Supp. 1997), N.C. GEN. STAT. § 115C-174.14 (1997), OHIO REV. CODE ANN. § 3301.07.11 (Anderson 1997), R.I. GEN. LAWS § 16-22-9 (1996).

[178] KAN. STAT. ANN. § 72-9403 (1992), W.VA. CODE § 18-28-3 (Supp. 1997).

[179] ME. REV. STAT. ANN. tit. 20-A, § 6207 (West 1993).

[180] ME. REV. STAT. ANN. tit. 20-A, § 6202 (West 1993).

education core curriculum.[181] However, in 1993 this test was redefined as a "rising junior test" to be given at the end of the sophomore year beginning Spring 1995.[182] There was no statutory indication of need for satisfactory score for student progression to the junior year. Results of the Arkansas test were to "be evaluated in light of each institution's mission and goals."[183]

Florida mandated college-level communication and computation skills testing (CLAST) in 1986. The stated legislative intent of the CLAST was demonstration that students had "mastered the academic competiencies prerequsite to upper-division undergraduate instruction."[184] Students may take the test after completion of eighteen semester hours of coursework. State supported universities and community colleges may not confer associate in arts or baccalaureate degrees to any student who does not pass the CLAST. However, in 1995 the statute was modified to exempt students from CLAST requirements if they have attained a cumulative grade point average of 2.5 on a 4.0 scale and they have specified passing scores on college placement

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[181] ARK. CODE ANN. § 6-61-111 (Michie 1996).

[182] ARK. CODE ANN. § 6-61-114 (Michie 1996).

[183] *Ibid.*

[184] FLA. STAT. ch. 240.107 (1997).

tests.[185] Adminstration of the examination to private postsecondary institutions was mentioned, but no indication was given for requirement of passing for degrees to be confered.[186]

In summary, Part IV was an analysis of state mandated standardized testing programs. For K-12 testing programs the subtopics analyzed were purpose of the testing program, basis of the test, requirement of passing scores for grade to grade level promotion and high school graduation, subjects commonly tested, and participation by nonpublic schools. Standardized testing in higher education was also discussed.

Thirty states specified the purpose of testing was to measure mastery or competency in educational skills and knowledge or to measure academic progress. This was further subdivided into states assessing student performance from the broad institutional level and states with emphasis on assessing the individual student. Fifteen states used the standardized testing for such institutional purposes as assessment of school performance, improvement of instruction, and comparison of state student performance to

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[185] *Ibid.* *See also* State Board of Education Rules (Rule 6A-10.0316).

[186] *Supra* note 184.

national levels of performance. Thirteen states primarily used the testing program to identify individual student needs.

The basis of most standardized testing programs was norm-referenced or criterion-referenced. Quantitative analysis was difficult in this area because some states used a combination of test basis. Ten states specified use of a nationally normed test. Twenty-one states indicated testing was to be based on some type of established criterion such as proficiency and minimum performance.

Not all states that had testing programs required a student to attain a passing score. Statutes in twenty states indicated some minimum acceptable score was necessary grade to grade promotion and/or high school graduation. Eleven other states outlined use of scores, but did not require a passing score.

The most consistently tested subject areas were basic skills in reading, writing, mathematics, and science. Twenty-nine states specified testing was to include reading and thirty-four states specified mathematics. Writing skill were to be tested in ninteen states and science was included in testing in sixteen states.

Participation in the state mandated standardized testing program was required in nonpublic K-12 schools in three states. Participation on a voluntary basis was permitted in four other states.

Only two states had statutorily defined testing requirements at the postsecondary level. Arkansas implemented testing in 1989 and Florida began in 1986. Florida requires passing scores to obtain associate in arts or baccalaureate degrees, however, provision has been made for some students to be exempt from test requirements. In Arkansas there was no statutory indication of requirements for pasing scores. Both states test academic competencies in specified areas.

CHAPTER V
CONCLUSIONS, DISCUSSION, AND RECOMMENDATIONS

The purpose of this study was to determine if there are written standards of care which could create a basis for liability in cases of educational malpractice. It was believed that the findings might provide a remedy under the theory of negligence in the law of tort to cover the harms caused by negligence in education. The following research questions were addressed:

1. How might the development of standards of care in medical malpractice be used by the courts in the recognition of standards of care for educators?

2. What educational accountability requirements currently mandated by state legislatures are creating standards of care that potentially assign liability to educators?

Conclusions

Research Question #1

Since the early cases of *Peter W.,*[1] *Donohue,*[2] and *Hoffman*[3]

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[1] Peter W. V. San Francisco Unified School District, 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

[2] Donohue v. Copiague Union Free Shcool District, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 376 (1979).

[3] Hoffman v. Board of Education 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).

the courts have consistently stated a reluctance to become involved in educational policy-making. The most frequent reasons cited have been the lack of a standard of care to which educators can be held and issues of public policy.

For negligence to be recognized, the first element that must be proven is a duty or obligation, recognized by the law, requiring a person to conform to a certain standard of conduct.[4] Inherent in the creation of a duty to conform to a standard of conduct is the need to demonstrate evidence of existing standards by which the performance of that duty can be evaluated. A plaintiff might use two possible origins to develop a legal basis for duty owed: common-law principles and statutory enactments.[5] To be successful, the plaintiff stating a cause of action in educational malpractice must first prove the educator owed the student a legally recognized duty to conform to a standard of reasonable care in the education of that student.

It has been proposed that state statutes reflect public policy attitudes that educators and institutions should be held responsible for their actions.[6] If statutory

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[4] W.PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 at 164 (1984)(hereinafter PROSSER).

[5] Destin S. Tracy, *Comment - Educational Negligence: A Student's Cause of Action for Incompetent Academic Instruction*, 58 N.C.L.REV.561, 565 (1980), Karen H. Calavenna, *Comment- Educational Malpractice*, 64 U.DET.L.REV. 717, 726 (1987).

[6] Nancy L. Woods, *Educational Malfeasance: A New Cause of Action For Failure To Educate?* 14 TULSA L.J. 383, 395

regulations exist outlining expectations of performance for educators, these statutes may represent the requisite standard educators have a duty to uphold. This would change the judicial role from one of setting policy to the more common one of ruling on the appropriateness in the application of existing or developing policy.

Legislative intent is a key component in the reliance on statutes as legal basis for development of liability in negligence. Some statutes contain the explicit statement "It is the intent of the Legislature that. . . ." More often the intent is implied by reliance on the stated purpose of the program or topic being outlined or found in legislative hearing proceedings held prior to the passage of the statute (beyond the limits of this study).

Due to similarities in early holdings by the courts in cases of medical malpractice, trends in development of standards in medicine were used as a model for this study. In medicine, if a patient's condition becomes worse or does not improve, there is a negative outcome and a plaintiff may allege the physician was negligent in providing a reasonable level of care. The physician is held to a higher standard of care than the ordinary person because the physician is considered a professional. Negligence on the part of a professional is termed malpractice.

(1978).

Medical institutions have also been involved in malpractice litigation both as primary defendant and when employees have been accused of negligence. Institutional liability has been based on the doctrine of respondeat superior and the doctrine of corporate negligence.[7] Although hospitals were originally viewed as simply providing physical facilities and accommodations for physicians to care for their patients, current trends focus on the hospital as a center for providing a full range of services.[8] Questions of institutional liability frequently depend on designation as being public versus private.[9]

Standards of practice in medicine have developed from the doctrines of locality rule and customary practice. The locality rule helped establish the appropriate standard by limiting the use of expert testimony to witnesses familiar with local practices. Over time the geographic concept of locality has been broadened to "same or similar community ". There is evidence of a move toward national standards because of national accreditation of medical schools, nationally recognized text books and national examinations.

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[7] *See generally,* AUTHUR F. SOUTHWICK, HOSPITAL LIABILITY: LAW AND PRACTICE 235-285 (Mary M. Bertolet & Lee S. Goldsmith eds., 1987).

[8] *Id.* at 251.

[9] *See generally* 40 AM. JUR. 2d, § 20 and § 26.

National standards are most often applied to those holding themselves out as specialist.[10]

Under the doctrine of customary practice, evidence of custom or well defined and regular usage among an occupational group is generally admissible in determination of the proper standard of conduct in ordinary negligence cases, but it is not a conclusive one.[11] In cases of medical negligence, professional custom becomes almost exclusively the measure of due care.[12] When different schools of thought or different methods are followed by various groups within a profession, the actor is to be judged by the standards of the group to which he belongs.[13] There must be definite rules and principles of treatment to be recognized as a school. These rules must be the line of thought of a respectable minority of the profession.[14] A concern of the courts has been whether customary practice necessarily represents good practice.[15]

Advances in medical technology have caused the standards of reasonable care to continuously evolve. What

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[10] *See generally* Chapter II notes 297 to 331 for discussion of development of standards in medicine based on the doctrine of locality rule.

[11] ALLAN H. McCOID, PROFESSIONAL NEGLIGENCE 14 (Thomas G. Roady & William R. Andersen, eds., 1960) at 69.

[12] *Id.* at 70.

[13] RESTATEMENT (SECOND) OF TORTS, § 229A, comment f.

[14] PROSSER § 32 at 187.

[15] *See generally* Chapter II notes 332 to 372 for discussion of customary practice.

was considered good medical care ten years ago may be considered grossly negligent in today's healthcare environment. The courts have responded by gradual changes in legal recognition of what constitutes reasonable care.

Written standards such as those developed by national accrediting agencies and state licensing and regulatory boards have been recognized by the court as establishing a professional standard of care in medical malpractice actions both against individuals and institutions.[16] Additionally, locally established policies and procedures have been cited as standards that institutions must abide by.[17]

In summary, when lay triers of fact began to hear cases alleging medical malpractice there was a reluctance to pass judgement on the appropriateness of care given to a patient. Judges and juries noted they did not have any standards by which to judge negligence of professional medical practitioners. The courts stated the specialized knowledge and skills practiced by medical personnel were beyond the understanding of the usual standard of the reasonable and ordinarily prudent person in the same or similar circumstances. Standards for both individual medical practitioners and medical institutions slowly began to emerge.

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[16] Darling v. Charleston Community Memorial Hospital 33 Ill.2d 326, 211 N.E.2d 253, 257 (1965).

[17] *Id.*.

Several trends were noted in the development of standards for the individual. Initially customary practice was the predominant standard. The application of the locality rule changed from a very local community to a national community with the advent of national standardized testing for credentialing and specialization of physicians. Some customary practices became so widely used the practice became recognized in case law as a standard for all medical practitioners. Although there was no standard requiring physicians to provide a cure, failure to properly diagnose using available technology also became a standard of care for individual physicians.

Two primary trends were noted in the development of standards of care for medical institutions. The first was changing views concerning the relationship between the institution and the patient. Historically the role of the hospital was simply to provide a building in which physicians and other medical personnel could carry out patient care. Today the medical facility is considered an integral component of the overall care of the patients. The second, and potentially more important, trend established negligence of a medical institution if policies such as accreditation standards, institutional by-laws, and written policies were not followed.

Research Question #2

The results of this study demonstrate there is a growing body of statutes in most states mandating expectations of individual educators and educational institutions. The public, through legislative action, has clearly indicated both concerns about quality in education and an insistence that educators be held accountable for a level of reasonable care in the educational process.

Part I of Chapter IV was an analysis of statutes covering broad issues of accountability. Statutes applicable to the individual educator and statutes applicable to institutions providing education were discussed. A total of nineteen states had statutes outlining generalized accountability at the individual educator level. Members of the teaching profession were expected to abide by professional standards or a code of professional conduct. The acutal codes of conduct and professional standards were not included in the statutory language. A few statutory compilations gave annotated reference to related administrative regulations. These were not included in the analysis for this study.

Although thirty-five states had standards, goals, or objectives of expected student outcomes, only eleven states specifically held some institutional component accountable for the achievement of student outcomes. A more generalized institutional accountability trend was the requirement for a

state level report, usually termed a report card, to legislators and the public. A total of thirty-five states mandated the report card with eighteen states adding this requirement since 1990.

Some type of formalized credentialing process was the most common form of statutorily defined standard for individual educators. Certification and/or licensure was mandated in all fifty states. Thirty-five states required some form of testing as part of the credentialing process and ten clearly indicated use or acceptance of a national level examination. This closely parallels the medical model and provides some support to the argument of a universally held body of knowledge that educators are expected to know.

A specific credential for teaching was predominantly required at the K-12 level in both public and private settings. There was no mandate for a standardized teaching credential at the post-secondary level in most states. In the few states where such requirements existed, it usually applied to individuals teaching in vocational and technical programs.

For institutions and programs, the primary standard of accountability mandated was accreditation. Of the thirty-two states referencing accreditation, eighteen dealt with K-12 only, seven addressed postsecondary institutions only, and eleven states had statutes discussing both K-12 and postsecondary institutions. Thirty-one states had statutory

language mandating some type of standardized control of teacher education. The basis of approval was most often related to curriculum, student teaching, and performance of graduates. None of the states required institutional accreditation at the national level. However, two states indicated recognition by a national accrediting body may be accepted in lieu of state approval.

Public concern for proficiency in computational skills and communication skills, especially reading and writing, was evident in the statutes. It was notable that basic skills testing was an element of both teacher certification/training and student assessment. Eighteen states included basic skills testing in the certification process for individual educators. Thirty-eight states outlined some type of standardized testing of students. The most consistently listed subjects to be evaluated were those considered to be the basic skills of reading, writing, and mathematics. Twenty-eight states specified testing was to include reading and thirty-five states specified mathematics. Writing skills were to be tested in nineteen states. The broader terms of language, language arts, communication, communication arts, and English were used in statutes of twelve states.

In summary, issues of accountability and liability related to education are complex. At the K-12 levels of instruction student acqusition of skills and knowledge are a

combined effort shared among teachers, students, parents, individual schools, and school districts. At the postsecondary level acqusition of advanced skills and knowledge continue to be a shared effort, but commonly with less input from parents. Various state level organizations and administrators also share in the efforts and activities particularily for public education systems.

The ultimate goal of this combined teaching/learning effort is to produce an educated individual capable of meaningful participation in contemporary society. While there is ongoing debate among educators, legislators, and concerned citizens regarding what constitutes "educated", there is general consensus that education is based, at least in part, on some minimal level of competence in basic literacy.

Since public education is a state level function, each state may define what constitutes minimal levels or competencies of literacy for the given population. Where these competencies are statutorily defined the public has indicated each person has a right to the knowledge and skills of basic literacy. Based on the growing number of statutes dealing with this issue, the public appears to be concerned that individual educators and/or educational institutions should be held liable if found to have interfered with the attainment of this right to basic literacy. Failure to attain state mandated levels of

performance should be considered failure to properly educate. Those interfering with the attainment of mandated performance levels whether by misfeasance or nonfeasance should be held liable for their actions.

Failure to properly educate should be recognized by the courts under limited conditions related to basic literacy mandates. Courts must stop hiding behind the vail of non-interference arguments based on public policy and lack of established standards for evaluation of duty. There are statutorily defined standards of what the educational system should at a minimum produce. The lack of statutory language related to the actual process of attaining defined levels of literacy should not be a reason to summarily dismiss the possibility of holding educators liable for a reasonable level of care in their professional duty to properly educate.

Statutes mandating requirements for accreditation are another source of standards defining minimum expectations for educational institutions. Many states did not actually outline specific criteria within the statutes. Depending on the source of accreditation state administrative codes and guidelines published by regional and national accrediting bodies would produce the written policies defining criteria necessary for compliance. These criteria establish expected standards of care for the institution.

Although individual educators are at some risk for assignment of liability related to basic literacy benchmarks demonstrated by standardized testing, clearly the educational institutions carry the greatest potential for liability under the theory of negligence in the law of tort.

Educational institutions are at greatest risk for assignment of liability associated with basic literacy. Additionally institutions are at risk for assignment of liability associated with accreditation standards.

Customary practice has routinely been used by the courts in cases alleging various types of professional negligence. Even in the absence of a statutory basis for standards of practice, there is no apparent reason courts should ignore customary practice as a potential source for defining an expected level of care in questions of negligence in education for both individual educators and educational institutions.

Discussion

Establishing accountability does not automatically establish actual liability. Liability is based on conduct considered socially unreasonable.[18] As discussed in Chapter II a person is subject to liability if their conduct is considered a legal cause of anothers injury. An interest is given legal protection if society recognizes a desire as being so legitimate that one who interferes with its

[18] PROSSER § 1 at 6.

realization will be held civilly liable.[19] As discussed previously the stated legislative intent of statutory language may represent what a given society considers important. The courts will ultimately decide if statutorily defined conduct will be recognized as a legal cause of liability.

The use of legislative enactments as a basis for establishing liability was addressed by the court in *Peter W.*. In that case the plaintiff alleged a duty of care was imposed by provision of law citing several California statutes including one requiring students to demonstrate reading abilities at a specific grade level.[20] The court disagreed noting a statute only imposes liability if the enactment was designed to protect against the risk of a particular injury.[21] The court went on to state the statutes cited were aimed at the attainment of optimum educational results not as safeguards against injury of any kind.[22]

With the growing number of statutes dealing with various forms and levels of accountability in education, it is clear citizens are demanding improvement in the

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[19] RESTATEMENT (SECOND) OF TORTS, §1 at 3.

[20] Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 818, 131 Cal. Rptr. 854, 856 (1976).

[21] *Id.* at 826, 862. The court went on to state "failure of educational achievement may not be characterized as an injury within the meaning of tort law." *Id.*)

[22] *Id.*

educational process and improvement in the product--educated students. The constitutionally mandated provisions for "opportunity" to gain an education is no longer adequate. Society has now recognized and legitimized the desire for some defined minimal level of literacy. Failure to attain that defined minimal level of literacy should be considered an injury in the meaning of tort law and individuals should be given legal protection.

The *Peter W.* court noted there are too many variables involved in the educational process to assign liability to educators.[23] It is the educator's responsibility to present information, but it is the student's responsibility to learn. Factors such as intellectual capacity, socioeconomic level, home environment, native language, and culture also influence the student's ability to learn.

Returning to the medical model many of the same variables exist. A physician cannot successfully treat a medical condition without the cooperation and compliance of the patient. Even when the medical condition is easily identifiable, treatment will not be effective if too many compounding variables exist. The physician is expected to use reasonable skill to identify and minimize variables that might bar a positive outcome. The physician does not have control over things such as the patient's hereditary

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[23] Peter W. V. San Francisco Unified School District, 60 Cal. App. 3d 814, 824, 131 Cal. Rptr. 854, 861 (1976).

predilection for certain physical and psychological problems, environmental conditions, culture and language biases, socioeconomic status, or intellectual capacity. If the physician has availed himself of the appropriate information, adjustments can be made in treatment regimens to minimize potential problems.

It has been argued liability cannot be assigned because the education of a student is the responsibility of multiple educators. The diagnosis and treatment of a patient is no longer the sole responsibility of a single health care provider. Although there may be a primary physician, other professionals are part of any treatment. Chemical laboratory tests, radiographic examinations, pharmaceutical personel, medical equipment suppliers, home health providers and third party reimbursement organizations may be involved in treatment decisions and follow-up care.

Based on the results of this study and using the medical model, there are several trends in statutorily defined accountability requirements that potentially assign liability to educators both as individuals and as educational institutions. The categories used for analysis will be discussed as they relate to establishment of potential standards for individual educators and educational institutions. Where relevant, common-law principles will also be discussed.

Standards for the Individual Educator

Standards of care for the individual educator may be derived from statutes outlining general accountability, credentialing/licensure, accreditation of teacher preparation programs, and standardized testing of both teachers and students.

One component of establishing standards for a duty of care is the determination of whether the alleged act or omission was one of ordinary negligence or one of professional negligence. The term malpractice usually specifically refers to professional negligence. Because physicians are defined as professionals they are held to a higher standard of care than the ordinary person in matters requiring the specialized knowledge and skills of a medical person.

In states assigning general accountability at the individual level and specifically defining the educator as a professional, teachers could reasonably be held to a higher standard of care in matters requiring their specialized knowledge and skills in education. Based on level of accountability and statutory definition as professionals, educators in Florida, Georgia, Kansas, Nebraska, North Dakota, South Dakota, and Utah are at greatest risk for assignment of professional negligence. Key to the establishment of liability, however, is whether the alleged act or omission required the specialized knowledge or skills

of the educator or whether the ordinary person would have known the appropriate course of action.

In cases of professional negligence a common source the courts have referred to in establishing standards of care have been the profession's code of ethics. Statutory language in the same states listed above clearly indicates members of the teaching profession are to abide by established standards and/or code of ethics.[24] A few statutory compilations provided cross references to administrative compilations containing the codes and standards. The use of codes of ethics as standards of care will be discussed further in the concluding remarks of this chapter.

In medicine over the past twenty years the locality rule was expanded to use the more geographically broad "same or similar communities" and nationally established standards. Customary practice in the community was commonly determined by the use of expert testimony. The courts supported the use of national standards by noting certain practices and procedures were basic to all physicians and indicated the standard of care should be that of the profession generally not locally or regionally.[25]

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[24] *See generally* Chapter IV notes 1 to 5.

[25] *See e.g.* Murphy v. Little, 112 Ga. App. 517, 145 S.E.2d 760 (1965)(x-rays should be standard in the treatment of fractures), Christian v. Jeter, 445 S.W.2d 51 (Tex. Civ. App. 1969)(care of open wounds).

The requirement for some type of teaching credential gives strong support to the concept that there is some basic level of knowledge that all educators in a geographic area are expected to possess. When lay triers of fact are unable to evaluate the technical judgement of defendants, customary practice is commonly established by expert testimony.

The physician who is a specialist is held to a higher standard than that of the ordinary physician. Likewise, in states where a progression or multiple levels of certification or licensure are defined, the expected level of care might depend on the level of credential held by the individual educator. States in which the level of general accountability is the individual educator and a progression of credentials is defined include Connecticut, Florida, Georgia, Idaho, Nebraska, and Pennsylvania. In these states educators holding more advanced credentials might be held to a higher standard of care than other educators in that state.

Because credentialing requirements are defined at the state level, the community of reference becomes the entire state and not local municipalities. In states requiring an examination as a component of the certification process, a state level test was most often prescribed thus helping establish the "same or similar community". The standard of care could be expanded from a state level to a national level in states specifically requiring use of the National

Teachers Examination. Those states include Alabama, Arkansas, Florida, North Carolina, and South Carolina. Statutes in California, Iowa, Mississippi, Oklahoma, and Pennsylvania refered to the use of a national level examination, but did not specify a particular test. Based on statutory language, the argument for holding individual educators to a national level standard rather than state standard of care might not be as strong in the latter five states.

With few exceptions the teaching credential only applies to educators at the K-12 levels. There were no statutorily defined standards of expected competencies or proficiencies at the postsecondary level.

The most consistently defined standard used in the credentialing process was that of basic skills proficiency. Another major area was content knowledge related to a specific area of teaching expertise. Those credentialed in specialized content areas might be held to a higher standard of care much like the specialist is in medicine.

Another area of statutory regulation analyzed in this study that potentially defines standards for the individual educator was standardized testing. Gathering appropriate information to use in the process of diagnosis and treatment has been a key element in the establishment of standards for physicians. As one court noted "failure to properly diagnose

may itself be malpractice".[26] However, a distinction has been made between "mere errors of judgment and negligence in previously collecting data essential to a particular conclusion."[27] The standard is that a physician must "avail himself of all the scientific means and facilities available to him so that he can obtain the best factual data upon which he can make a diagnosis."[28] Liability may be established if a physician does not inform himself of the facts and circumstances and injury results.[29]

Over time the courts have begun to legally recognize some practices and procedures as standard for all physicians. A reasonable analogy is that all educators, using the results of appropriate standardized tests, should be able to recognize the student that is not able to read or write or compute at appropriate grade levels. Standardized tests continue to be developed and refined to assist in the recognition of learning problems. The court in *Peter W.*[30] stated there were so many pedagogical approaches to teaching that there could be no standard, yet the specific methods used in teaching were not at issue.

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[26] Dickinson v. Mailliard, 175 N.W.2d 588, 590 (1970).

[27] Peterson v. Hunt, 84 P. 2d 999, 1000 (1938).

[28] Forrestal v. Magendantz, 848 F. 2d 303, 304 (1st Cir. 1988)(quoting Wilkinson v. Vesey 110 R.I. at 615-16, 295 A. 2d, at 683).

[29] *Supra* note 14.

[30] *Supra* note 3.

There are many ways to gather information on the educational status of students. Like physicians, it would be reasonable to expect educators to avail themselves of the best factual data upon which to base decisions on student progress. Standardized testing is one method of assessing levels of proficiency in many areas including computational and communication skills. The term "standardized" indicates there is an established testing method and an expected level of performance based on given criteria such as grade level or age level. Radiographic studies, commonly called x-rays, provide generally reliable information in the diagnosis and treatment of specific medical conditions. Likewise, standardized testing in the educational setting provides data for use in the identification and treatment of problems in limited, but generally well defined areas of academic abilities.

It is well established that an individual may not gain a basis of action from statutes intended to protect a group.[31] Therefore, the greatest potential for establishment of liability would be in states where the stated purpose of testing is identification of academic abilities and deficiencies of the individual student not problems within groups such as entire grade level cohorts.[32]

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[31] *See generally* H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928).

[32] An individual relying on statutes intended to protect a group as a basis of action would first have to establish

As previously noted, legislative intent is important in statutory development of liability. Therefore, standardized testing statutes with explicitly stated legislative intent to protect the individual student would further strengthen establishment of liability.

Based on the purpose of the testing program and the level of accountability, potential liability of individual educators would appear to be greatest in California and Massachusetts. The purpose of the standardized testing program in California is to identify the need for individual remedial instruction.[33] Since a teacher's competency is based in part on the progress of students toward established levels of performance, then failure to recognize an individual student's problem in a tested area would be similar to failure to properly diagnose. There was, however, no clear indication of legislative intent. Section 51216 stated the standardized testing program was to measure progress of the individual student.[34] However, section 60601 stated the testing system has as its primary purpose, the broader scope of improvement of instruction.[35]

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themself as a member of the group. *See generally* Moch v. Rensselaer, 247 N.Y. 160, 159 N.E. 896 (1928).

[33] CAL. EDUC. CODE § 51216 (West Supp. 1997).

[34] *Id.*.

[35] CAL. EDUC. CODE § 60601 (West Supp. 1994). In *Peter W.* the plaintiff alleged, among other things 1) the school district failed to apprehend reading disabilities, 2) the student was assigned to classes in which he was not able to comprehend books and materials, and 3) the student was

Individual educators in Massachusetts would also appear to be at risk for assignment of liability based on statutes related to standardized testing of students. The stated purpose of that testing program was diagnosis of individual needs[36] and educators are to be held liable for student achievement of educational performance goals.[37] However, the statute assigning individual educator accountability also specifically stated failure to obtain a competency determination based on set academic standards does not provide a cause of action for educational malpractice.[38] Although educational malpractice has not been legally recognized in Massachusetts, it appears the lawmakers recognized the potential for the future development of such a cause of action.

Standards for Educational Institutions

Potential standards of care for educational institutions may be derived most directly from state statutes outlining general accountability, standardized testing of students, standardized testing in teacher

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allowed to pass through courses and grade levels knowing he did not possess necessary skills. (Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 818, 131 Cal. Rptr. 854, 856 (1976) It is unclear if standardized testing was mandated at the time. The statutes defining California's standardized testing program reviewed for this study were initially passed in 1977.

[36] MASS. ANN. LAWS ch. 69 § 1I (Law Co-op. Supp 1994).

[37] MASS. ANN. LAWS ch. 69 § 1 (Law Co-op. Supp. 1994).

[38] *Ibid.*

preparation programs, and accreditation. Indirectly statutes defining certification/licensure might be used as standards under the common law concepts of respondeat superior and corporate negligence. In this study educational instututions included individual schools, school districts, and school boards.[39]

Based on the purpose of the testing program and the specified level of general accountability, potential establishment of liability at the institutional level would be strongest in cases argued in Colorado, Florida and Nevada. In these states the specified purpose of the testing program is identification of individual abilities and the institution is the statutorily mandated educational component responsible for student outcomes.

Colorado assigned general accountability at the school district level.[40] Content standards of what a student should know in specified academic areas have been developed and acceptable performance levels of achievement by grade level are defined. Results of the assessment program are to used, in part, to "diagnose the learning needs of the individual student."[41]

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[39] *See generally* Chapter IV, notes 14 to 17.

[40] COLO. REV. STAT. ANN. § 22-7-409 (West Supp. 1997).

[41] COLO. REV. STAT. ANN. § 22-53-409 (West Supp. 1994).

Statutes in Florida and Nevada indicate test results are to be used to determine remedial instruction needs of the student.[42] Although the individual student is implied, the word individual is not explicitly stated. This terminology difference might be enough to weaken the argument in these two states. Like Colorado, Nevada specified the school district as the level of accountability, however, Florida specified the individual school unit.[43]

Medical institutions have been held liable in cases where established policies were not followed. Therefore, another area of potential liability for institutions related to standardized testing is the use of results to determine grade level progression and graduation. A cause of action in misfeasance or nonfeasance against an educational institution might be established in states requiring minimum acceptable scores for promotion if those statutes were not followed. Courts would be out of the business of setting policy - something they have indicated unwilling to do - merely deciding if set policies are being adhered to. Combining the requirement for a passing score and specified level of general accountability, individual schools in Florida and school districts in Nevada and New Mexico could

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[42] *E.g.* FLA. STAT. ch. 229.512 (1997), NEV. REV. STAT. § 389.015 (1996).

[43] NEV. REV. STAT. § 389.347 (1996), FLA. STAT. ch. 229.512 (1997).

be held liable if students were allowed to graduate without the required minimum scores.[44] Both school districts and individual schools might incur liability in Mississippi.[45]

Statutes mandating accreditation may be another potential source defining standards of care for educational institutions. Institutions must maintain overall accreditation status and comply with all individual standards related to gaining that status. Although twenty states required accreditation of public K-12 institutions, only Kentucky, Louisiana, Mississippi, New Mexico, and Virginia specified an educational institution was to be held generally accountable. Kentucky required school districts be accredited rather than individual schools, but the school district is also the general level of accountability. Virginia specifies dual accountability to school boards and teachers. Missouri, North Carolina, Texas, and West Virginia required K-12 accreditation, however statutory language implied rather than specifically stated some institutional component was to be held generally accountable for educational outcomes.

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[44] FLA. STAT. ch. 229.512 (1997)(individual school is unit of accountability), FLA. STAT. ch. 229.57 (1997)(requires passing score for graduation), NEV. REV. STAT. § 385.347 (1996)(school district accountable), NEV. REV. STAT. § 389.015 (1996)(requires passing score), N.M. STAT. ANN. § 22-1-6 (Michie 1996)(school district accountable), N.M. STAT. ANN. § 22-2-8.4 (Michie Supp. 1996)(requires passing grade).

[45] MISS. CODE ANN. § 37-1-2 (1996)(assigns accountability and requires passing score).

One of the basic questions of fact for the court to determine is whether a school met the standards required by law. For accredited schools these standards are well defined. The more difficult question is whether failure to meet the standards is in fact negligence. In cases of medical malpractice the well established answer is yes.

Statutes outlining certification/licensure provide potential standards in two different yet related ways. First, if certification is required to teach and a school has noncertified personnel teaching, then negligence may be established directly: the school did not hire qualified individuals. In the case of negligent hiring the facts would be fairly straight forward.

Institutions may also be held vicariously liable under the concept of respondeat superior. To establish negligence under this common law theory, two key issues must be addressed: 1) Was the tort within the scope of employment? and 2) Is the teacher an agent or employee of the institution? Establishment of the teacher as an agent of the institution may hinge on the level of the institution. For instance if teachers are employed by school districts, but it is alleged the individual school has been negligent, respondeat superior could not be relied upon. If, however, the school district is the employer and the defendant in the

action, negligence could be established. Private schools that independently employ teachers would be at greatest risk under this theory.

A final potential for development of standards for educational institutions is the area of corporate negligence. In medical malpractice hospitals have been recognized as entities or corporate institutions. While there may be some difficulty with the analogy of a school or school district as a corporate institution, these are certainly well defined entities. The key legal question is whether the school owes a direct legal duty to students. Duty owed depends, in part, on the role or purpose of the institution. Hospitals were originally thought to simply provide physical facilities for private physicians to care for patients. Today hospitals are expected to provide a full range of healthcare services. Do educational institutions simply provide a place for teachers to work or is the role a broader one of providing a full range of educational services which might include diagnosis of learning difficulties, classroom instruction, and other educational opportunities?

Legally recognized corporate duties include the exercise of reasonable, ordinary care in the selection and maintenance of equipment, buildings and grounds, and the selection and retention of employees. The courts have recognized institutional liability in cases of physical

injury as a result of equipment and buildings. If courts have been willing to recognize these corporate duties, then issues related to other forms of "care" such as proper testing and accreditation should not be viewed as outside the relm of corporate responsibilities for the educational institution.

In summary, there are several statutory sources potentially defining standards of care for schools, school districts, and school boards. Standards may be derived directly from statutes outlining standardized testing and accreditation. Requirements for certification/licensure might define standards for educational institutions under the common law principles of respondeat superior or corporate negligence.

Potential assignment of liability based on standards related to standardized testing is highest for institutions in Colorado, Florida, and Nevada. Standards based on statutory accreditation requirements could be established for K-12 institutions in Kentucky, Louisiana, Mississippi, and Virginia.

Recommendations

Although legal precedent changes very slowly, state statutes are constantly changing. Statutory compilations should be reviewed annually to continually assess trends in individual state and national accountability initiatives.

Most state statutes did not include specific language defining accreditation standards. Accreditation standards of the appropriate level or organization should be reviewed to provide greater detail of expected processes and outcomes. When accreditation standards are defined in regulations issued by a state administrative organization, the regulations carry the weight of law in that state. Accreditation standards defined by regional or national accrediting bodies have been recognized by the courts in cases of medical malpractice.

Individual state administrative codes should be researched for other potential standards of care defined by codes of ethics, professional boards, teacher credentialing boards, and other organizations.

There is likely a difference in the number of states mandating use of a national level examination for teacher credentialing and the number of states actually using a national level examination. Because of the potential importance in defining customary practice, information should be gathered to establish more conclusively how many states actually use a national level teachers examination as part of the credentialing process.

BIBLIOGRAPHY

Alexander, K.(1980). School law. St. Paul, MN: West Pub. Co.

Alexander, K., & Alexander M. D.(1984). The law of schools, students, and teachers. St. Paul, MN: West Pub. Co.

American Dental Association, Commission of Dental Accreditation. (1990). Standards for advanced education programs in general practice residency. Chicago: Author.

American Medical Association, 1991-1992 Directory of graduate medical education programs, Appendix B. Chicago: Author.

Asher, R. S. (1989). The regulatory law as it affects physicians. In J. R. Vevaina, R. C. Bone, & E. Kassoff (Eds.), Legal aspects of medicine (pp. 26-32). New York: Springer-Verlag.

Assessing the outcomes of higher education: Proceedings of the 1986 Educational Testing Service Invitational Conference (1986). Princeton, NJ: Educational Testing Service.

Banta, T. W. (Ed.). (1988). Implementing outcomes assessment: Promise and perils: New Directions for Institutional Research, No. 59. San Francisco: Jossey-Bass Pub.

Beckham, J. (1980). Legal implications of minimum competency testing. Bloomington, IN: Phi Delta Kappa Educational Foundation.

Belli, M. M. (1989). The evolution of medical malpractice law. In J. R. Vevaina, R. C. Bone, & E. Kassoff (Eds.), Legal aspects of medicine (pp. 3-7). New York: Springer-Verlag.

Bennett, W. J.(1984). To reclaim a legacy: A report on the humanities in higher education. Washington, DC: National Endowment for the Humanities.

Bidese, C. M. (1993 ed.). U.S. medical licensure statistics and current licensure requirements. Chicago: American Medical Association.

Blackburn, J.(1978). Educational malpractice: When can Johnny sue? Fordham Urban Law Journal, 7,- 117-144.

Bogue, E. G., & Sanders, R. L. (1992). The evidence for quality: Strengthening the tests of academic and administrative effectiveness. San Francisco: Jossey-Bass Pub.

Bovbjerg, R. (1975). The medical malpractice standard of care: HMOs and customary practice. Duke Law Journal, 1975, pp. 1375-1414.

Buchter, J. F. (1973). Contract law and the student-university relationship. Indiana Law Journal, 48, 253-262.

Butler, E. R.(1985). Educational malpractice update. Capital University Law Review, 14, 609-629.

Calamari, J. D., & Perillo, J. M. (1987). The law of contracts (3rd ed. § 2-5). St. Paul, MN: West Publishing Co.

Calavenna, K. H. (1987). Comment--Educational malpractice. University of Detroit Law Review, 64, 717-745.

Cherry, R. L. Jr., & Geary, J. P.(1992). The college catalog as a contract. Journal of Law & Education, 21, 1-32.

Cohen, M. L., Berring, R. C., & Olson, K. C. (1989). Finding the law. St. Paul, MN: West Publishing Co.

Collingsworth, T. P.(1982). Applying negligence doctrine to the teaching profession. Journal of Law & Education, 11, 479-505.

Collis, J.(1990). Educational malpractice: Liability of educators, school administrators, and school officials. Charlottesville, VA: The Michie Company.

Commission on Accreditation in Physical Therapy Education. (1996). Evaluative criteria for accreditation of education programs for the preparation of physical therapists. Alexandria, VA: American Physical Therapy Association.

Conners, E. T. (1981). Educational tort liability and malpractice. Bloomington, IN: Phi Delta Kappa.

Corbett, H. D., & Wilson, B. L. (1991). Testing, reform, and rebellion. Norwood, NJ: Ablex Publishing Corporation.

Curran, W. J. (1960). Professional negligence--Some general comments. In T. G. Roady & W. R. Andersen (Eds.), Professional negligence (pp.1-12). Nashville: Vanderbilt University Press.

Danzon, P.(1985). Medical malpractice: Theory, evidence, and public policy. Cambridge, MA: Harvard University Press.

Dondanville, J. W. (1975). Defending accountants' liability: Trends and implications, The Forum, 15, 173-193.

Dornette, W. H. L. (1987). The legal impact of voluntary standards in civil actions against the health care provider. In M. M. Bertolet & L. S. Goldsmith (Eds.), Hospital liability Law and practice (5th ed., pp. 207-230). New York: Practising Law Institute.

Drechsler, C. T. (1981). Physicians, surgeons, and other healers. American Jurisprudence 2d, 61, 139-571.

Eddy, D. M.(1984). Variations in physician practice: The role of uncertainty. Health Affairs, 3(2), 74-89.

Edson, C. H. (1990). Our past and present: Historical inquiry in education. In R. R. Sherman & R. B. Webb (Eds.), Qualitative research in education: Focus and methods (pp. 44-57). London: The Falmer Press.

Elson, J.(1976). A common law remedy for the educational harms caused by incompetent or careless teaching. Northwest University Law Review, 73, 641-771.

Essex, N. L.(1986). Teacher malpractice--Fact or fantasy? The Teacher Educator, 21, 2-7.

Funston, R. (1981). Educational malpractice: A cause of action in search of a theory. San Diego Law Review, 18, 743-812.

Goldhammer, K., & Weitzel, B. (1981). What is competency-based education? In R. Nickse & L. McClure (Eds.), Competency-based education: Beyond minimum competency testing (pp. 42-61). New York: Teachers College Press.

Hagerty, B. M. K., & Stark, J. S.(1989). Comparing educational accreditation standards in selected professional fields. Journal of Higher Education, 60, 3-20.

Hall, R. E. (1988). The evolution of the contractual relationship between American students and their colleges or universities. (Doctoral dissertation, University of Florida, 1988). Dissertation Abstracts International, 50A, 0083.

Harney, D. M. (1980). Medical malpractice (§ 3.3 at 95). Indianapolis, IN: The Allen Smith Co.

Harney, D. M. (1987). Medical malpractice (2nd ed., § 21.3 at 413). Indianapolis, IN: The Allen Smith Co.

Harris, J. J., III, & Carter, D. G., Sr. (1980). Educational malpractice: The concept, the public, the schools and the courts. In M. A. McGhehey (Ed.), School law in contemporary society (pp. 244-264). Topeka, KS: NOLPE.

Hospitals and asylums. (1968). American Jurisprudence 2d, 40, 849-887.

Hudgins, H. C., & Vacca, R. S., Jr. (1985). Law and education: Contemporary issues and court decisions (2nd ed.). Charlottesville, VA: The Michie Company.

Jaggard, E. A.(1895). Handbook of the law of torts. St. Paul, MN: West Publishing Co.

Jamieson, L. S.(1991). Educational malpractice: A lesson in professional accountability. Boston College Law Review, 32, 899-965.

Jennings, E. K. (1981). Breach of contract suits by students against postsecondary education institutions: Can they succeed? Journal of College and University Law, 7, 191-221.

Jerry, R. H.(1981). Recovery in tort for educational malpractice: Problems of theory and policy. Kansas Law Review, 29, 195-212.

Johns, D. A. (1971). Annotation: Locality rule as governing hospitals standard of care to patient and expert's competency to testify thereto. American Law Reports 3d, 36, 440-457.

Johnson, J. K., Jr. (1970). An evaluation of changes in the medical standard of care. Vanderbilt Law Review, 23, 729-753.

Keeton, W. P., Dobbs, D. B., Keeton, R. E., & Owen, D. G. (1984). Prosser and Keeton on torts (5th ed.). St. Paul, MN: West Publishing Co.

King, J. H. (1986). The law of medical malpractice in a nutshell (3rd ed.). St. Paul, MN: West Publishing Co.

Kinney, E. D., & Wilder, M. M. (1989). Medical standard setting in the current malpractice environment: Problems and possibilities. University of California Davis Law Review, 22, 421-450.

Klein, A. J. (1979). NOTES, Educational malpractice: Can the judiciary remedy the growing problem of functional illiteracy? Suffolk University Law Review, 13, 27-62.

Kramer, C. (1986). Medical malpractice (Vol. 3 ¶ 29.01-29.03). Albany, NY: M. Bender.

Kramer, C., & Kramer, D. (1983). Medical malpractice (5th ed.). New York: Practising Law Institute.

Landon, P. A. (1951). Pollock's law of torts (15th ed.). London:Stevens & Sons Limited.

Lazarus, M. (1981). Goodbye to excellence: A critical look at minimum competency testing. Boulder, CO: Westview Press.

Lipsitz, L. (Ed.). (1977). The test score decline: Meaning and issues. Englewood Cliffs, NJ: Educational Technology Publications.

Litan, R. E. , Swere, P., & Winston, C. (1988). The U.S. liability system: Background and trends. In R. E. Litan & C. Winston (Eds.) Liability perspectives and policy (pp. 1-15). Washington, DC: The Brookings Institution.

Loscalzo, T. E. (1985). Liability for malpractice in education. Journal of Law & Education, 14, 595-607.

Louisell, D. W., & Williams, H. (1986). Medical malpractice (§ 14.01). Albany, NY: M. Bender.

Lynch, P. D. (1979). Educational policy and educational malpractice. In M. A. McGhehey (Ed.) Contemporary legal issues in education (pp. 209-242). Topeka, KS: NOLPE.

Magone, M. M. (1988). Educational malpractice--Does the cause of action exist? Montana Law Review, 49, 140-146.

Mallen, R. E. & Smith, J. M. (1989). Legal malpractice (3rd ed.). St. Paul, MN: West Publishing Co.

Matthews, J. M., Swanson, R. G., & Kerker, R. M. (Eds.). (1991). From politics to policy: A case study in educational reform. New York: Praeger.

McBride, C. D. (1990). Educational malpractice: Judicial recognition of a limited duty of educators toward individual students; A state law cause of action for educational negligence. University of Illinois Law Review, 475-495.

McCarthy, M. M., & Cambron-McCabe, N. H. (1992). Public school law: Teachers' and students' rights (3rd ed.). Boston: Allyn and Bacon.

McCoid, A. H. (1960). The care required of medical practitioners. In T. G. Roady & W. R. Andersen (Eds.), Professional negligence (pp. 13-96). Nashville, TN: Vanderbilt University Press.

McMillan, J. H., & Shumacher, S. (1989). Research in education: A conceptual introduction (2nd ed.). Glenview, IL: Scott, Foresman and Company.

Mehrens, W. A., & Lehmann, I. J. (1991). Measurement and evaluation in education and psychology (4th ed.). Fort Worth, TX: Holt, Rinehart and Winston, Inc.

Michaud, G. L., & Hutton, M. B. (1981). Medical tort law: The emergence of a specialty standard of care. Tulsa Law Journal, 16, 720-733.

Morris, C., & Morris, C. R., Jr. (1980). Morris on torts (2nd ed.). Mineola, NY: The Foundation Press, Inc.

National Commission of Excellence in Education. (1984). A nation prepared: Teachers for the 21st century. New York: Carnegie Forum on Education and the Economy.

Nichols, J. O., & Wolff, L. A. (1990). Organizing for assessment. In J. B. Presley (Ed.) Organizing effective institutional research offices: New directions for institutional research no. 66 (pp. 81-92). San Francisco: Jossey-Bass Inc., Pub.

Nolte, M. C. (1984). Empirical research on education law issues: A model. In T. N. Jones & D. P. Semler (Eds.) School law update...Preventive school law (pp.94-105). Topeka, KS: NOLPE.

Note: Medical specialties and the locality rule. (1962). Standford Law Review, 14, 884-893.

O'Hara, J. U. (1984). Commentary: The fate of educational malpractice. Education Law Reporter, 14, 887-895.

Ornstein, A. C., & Talmage, H. (1973). The rhetoric and the realities of accountability. Today's Education, 62(6), 70-80.

Parker, C. A., & Delco, W. R. (1991). Legislative response. In J. M. Matthews, R. G. Swanson & R. M. Kerker (Eds.), From politics to policy: A case study in educational reform (pp. 19-30). New York: Praeger.

Patterson, A. H. (1984). How to avoid an educational malpractice suit. In T. N. Jones & D. P. Semler (Eds.), School law update...Preventive school law (pp. 69-93). Topeka, KS: NOLPE.

Pegalis, S. E. & Wachsman, H. F. (1980). American law of medical malpractice (Vol. 1). Rochester, NY: The Lawyers Co-operative Publishing Co.

Pollock, F. (1929). The law of torts (12th ed.). London: Stevens and Sons, Ltd.

Pottinger, P. S., & Goldsmith, J. (Eds.). (1979). Defining and measuring competence. San Francisco: Jossey-Bass Inc., Pub.

Powicke, F. M., & Emden, A. B. (Eds.). (1936). The universities of Europe in the Middle Ages (Vol. 1). London: Oxford University Press.

Public papers of the presidents of the United States: Richard M. Nixon. (1970). Washington, DC: United States Government Printing Office.

Restatement (second) of contracts (Vol. 1). (1981). St. Paul, MN: American Law Institute Publishers.

Restatement (second) of torts (Vol. 1). (1965). St. Paul, MN: American Law Institute Publishers.

Roady, T. G., Jr., & Anderson, W. R. (Eds.). (1960). Professional negligence. Nashville: Vanderbilt University Press.

Rose, L. C., Gallup, A. M., & Elam, S. M. (1997). The 29th annual Gallup/Phi Delta Kappa pole of the public's attitude toward public schools. Phi Delta Kappan, 79, 41-56.

Sandor, A. A. (1957). The history of professional liability suits in the United States. Journal of the American Medical Association, 163, 459-466.

Schiffres, I. J. (1974). Torts. American Jurisprudence 2d, 74, 615-695.

Schockemoehl, G. M. (1984). Admissibility of written standards as evidence of the care in medical and hospital negligence actions in Virginia. University of Richmond Law Review, 18, 725-749.

Seavey, W. A. (1942). Principles of torts. Harvard Law Review, 56, 72-98.

Shapo, H. S., Walter, M. R., & Fajans, E. (1989). Writing and analysis in the law. Westbury, NY: Foundation Press, Inc.

Shapo, M. S. (1977). The duty to act: Tort law, power and public power. Austin , TX: University of Texas Press.

Sherman, T. G., & Redfield, A. A. (1870). A treatise on the law of negligence (2nd ed.). New York: Baker, Voorhis & Co.

Smith, J. M. (1981). Preventing legal malpractice. St. Paul, MN: West Publishing Co.

Southwick, A. F. (1987). Hospital liability: Two theories have been merged. In M. M. Bertolet & L. S. Goldsmith (Eds.), Hospital liaability: Law and practice (5th ed., pp. 235-285). New York: Practising Law Institute.

Standards and assessments. (1997, January 22, Supp.). Education Week, 16, 32-35.

Strahan, R. D., & Turner, L. C. (1987). The courts and the schools: The school administrator and legal risk management today. New York: Longman.

Strickland, R., Phillips, J. F., & Phillips, W. R. (1976). Avoiding teacher malpractice: A practical legal handbook for the teaching professional. New York: Hawthorn Books, Inc.

Strenio, A. J., Jr. (1981). The testing trap. New York: Pawson, Wade Publishers, Inc.

Thrash, P. (1988, July-August). Educational "outcomes" in the accrediting process. Academe, pp. 16-18.

Waltz, J. R. (1969). The rise and gradual fall of the locality rule in medical malpractice litigation. De Paul Law Review, 18, 408-420.

Tracy, D. S. (1980). Comment--Educational negligence: A student's cause of action for incompetent academic instruction. North Carolina Law Review, 58, 561-591.

Wald, R. L. (1979). Annotation: Accountant's malpractice liability to client. American Law Reports 3d, 92, 396-431.

Waldman, M. J. (1982). Prenatal injuries: Wrongful life, birth, or conception. American Jurisprudence 2d, 62A, 393-518.

Ward, P. (1974). The tort cause of action. Gainesville, FL: Holland Law Center.

Winfield, P. H. (1926). The history of negligence in the law of torts. The Law Quarterly Review, 42, 184-201.

Winfield, P. H. (1934). Duty in tortious negligence. Columbia Law Review, 34, 41-66.

Weiland, D. G. (1986). Another early chapter: Attorney malpractice and the trial within a trial: Time for change. John Marshall Law Review, 19, 275-299.

Wilkins, K. A. (1988). Educational malpractice: A cause of action in need of a call to action. Valparaiso University Law Review, 22, 427-460.

Woods, N. L. (1978). Educational malfeasance: A new cause of action for failure to educate? Tulsa Law Journal, 14, 383-409.

Young, K. E., Chambers, C. M., & Kells, H. R. (1983). Understanding accreditation. San Francisco: Jossey-Bass.

Young, R. H. (1959). Medical education in the United States Journal of Medical Education, 34, 801-813.

Zupanec, D. M. (1980). Annotation: Architect's liability for personal injury or death allegedly caused by improper or defective plans or design. American Law Reports 3d, 97, 455-481.

List of Cases

Aumbrun v. University of Southern California, 25 Cal. App.3d 1, 100 Cal. Rptr. 499 (1972)

Avey v. St. Francis, 201 Kan. 687, 442 P. 2d 1013, 1022 (1968)

2 BABYLON LAW, § 218 at 81, cited in CHARLES KRAMER

Bing v. Thuning, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

Blair v. Eblen, 461 S.W.2d 370, 373 (Ky. App.1970)

B.M. v. State, 200 Mont. 58, 649 P.2d 425 (1982)

Brown v. Board of Education, 374 U.S. 483 (1954)

Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968)

Cassady v. Hendrickson, 486 N.E.2d 1329 (1985)

Chevlin v. Los Angeles Community College District, 212 Cal.App.3d 386, 260 Cal.Rptr. 658 (1989).

Christian v. Jeter, 445 S.W.2d 51 (Text Civ. App. 1969)

Christy v. Saliterman, 288 Minn. 144, 179 N.W.2d 288, 302 (1970)

Cornfeldt v. Tongen, 262 N.W. 2d 684 (1977)

Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 221 N.E. 2d 253 (1965), *cert. denied,* 383 U.S. 946 (1966)

Dickinson v. Mailliard, 175 N.W. 2d 588, 596 (Iowa 1970)

Dizick v. Umpqua Community College, 330 Or. App. 559, 577 P.2d 534 (1978)

Doe v. Board of Education of Maryland, 295 Md. 67, 453 A.2d 814 (1982)

Donaldson v. O'Connor, 493 F.2d 507 I5th Cir. 1974), *vacated* 422 U.S. 563 (1975)

Donnelly Construction Co. v. Oberg/Hunt/Gillelend, 139 Ariz. 184, 677 P.2d 1292 (1984)

Donohue v. Copiague Union Free School District, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 376 (1979)

Douglas v. Bussabarger, 73 Wash. 2d 476, 438 P.2d 829 (1968)

D.S.W. v. Fairbanks North Star Borough School District, 628 P.2d 554 (1981)

Duling v. Bluefield Sanitarium, Inc., 149 W.Va. 567, 142 S.E. 2d 754 (1965)

Early v. Noblin, 380 So.2d 272 (Ala. 1980)

Forrestal v. Magendantz, 848 F.2d 303 (1st Cir.1988)

Garrison v. Medical Center of Delaware, Inc., 581 A.2d 288 (Del. Supp. 1989)

Glisson v. Loxley, 366 S.E.2d 68, 235 Va. 62 (1988)

Gorris v. Scott, L.R. 9 Ex. 125 (1874)

In re Gregory B. 88 Misc. 2d 313, 387 N.Y.S.2d 380 (Fam. Ct. 1976)

Hathorn v. Righmond, 48 Vt. 557 (1876)

Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (1929)

Hayhurst v. Boyd Hospital, 43 Idaho 661, 254 P. 528 (1927)

Helm v. Professional Children's School, 431 N.Y.S.2d 246 (1980)

Hoffman v. Board of Education 410 N.Y.S.2d 99, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979)

Holtzman v. Hoy, 118 Ill. 534, 8 N.E. 832, 59 Am. Rep. 390 (1886)

Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977)

Hunter v. Board of Education, 47 Md. App. 709,425 A.2d 681 (1981)

Hunter v. Board of Education of Montgomery County, 439 A.2d 582 (1982)

Jack M. v. School Board of Santa Rosa County, U.S. Dist. Ct. for the Northern District of Florida, Pensacola Division, No. PCA 790050 (1980)

John Scopes v. State of Tennessee, 152 Tenn. 424, 278 S.W. 57, 154 Tenn. 105, 289 S.W. 363 (1927)

Johnson v. Misericordia Community Hospital, 99 Wis. 2d 708, 301 N.W.2d 156 (1981)

Johnson v. Winston, 68 Neb. 425, 94 N.W. 607 (1903)

Kastler v. Iowa Methodist Hospital, 193 N.W.2d 98, 101 (1971)

K Mary Corp. v. Ponsock, 732 P. 2d 1364, 103 Nev. 39 (1987)

Lambert v. Michel, 364 So.2d 248 (1978)

Lindsay v. Thomas, 465 A.2d 122 (Pa. Comwlth.1983)

Lockart v. Naclean, 77 Nev. 210, 361 P.2d 670 (1961)

Loughran v. Flanders, 470 F. Supp. 110 (1979)

Lowenthol v. Vanderbuilt University, No. A-8525 (Davidson County, Tenn. Ch. Ct., Memorandum Opinion (1976)

Lundahl v. Rockford Memorial Hospital Association, 93 Ill. App. 2d 461, 235 N.E.2d 671 (1968)

Meyer v. Board of Education, 9 N.J. 46, 86 A.2d 761 (1952)

McHugh v. Audet, 72 F. Supp. 394, 399 (M.D. Pa.1947)

Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E.896 (1928)

Moore v. Vanderloo 386 N.W.2d 108, 114 (1986)

Moultrie v. Medical University of South Carolina, 280 S.C.159, 311 S.E.2d 730 (1984)

Murphy v. Little, 112 Ga.App. 517, 145 S.E.2d 760 (1965)

Naccarato v. Grob, 384 Mich. 248, 180 N.W.2d 788 (1970)

O'Neil v. Great Plains Women's Clinic, Inc., 759 F.2d 787 (CA10 Okla. 1985)

Overby v. Johnson, D.C.Mich., 418 F. Supp. 471 (1976).

Paladino v. Adelphi University, 89 A.D.2d 85, 454 N.Y.S.2d 868 (1982)

Palsgraf v. Long Island Railroad Company, 248 N.Y. 339, 162 N.E. 99, 1928)

Penderson v. Dumouchel, 72 Wash.2d 73, 431 P.2d 973 (1967)

Peretti v. State of Montana, 464 F. Supp.784 (1979)

Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976)

Peterson v. Hunt, 84 P.2d 999 (1938)

Phillips v. U.S., 566 F. Supp. 1 (1981)

Pike v. Honsinger, 155 N.Y. 201, 49 N.E. 760, 762 (1898)

Priest v. Lindig, 583 P.2d 173 (Alaska 1978)

Rameland v. Shaw, 341 Mass. 56, 166 N.E.2d 894 (1960)

2 Root 90 (Cone. 1794) (in McCoid)

Ross v. Creighton University, 740 F.Supp. 1319 (N.D.Ill. 1990)

Rostron v. Klein, 178 N.W.2d 675 (1970)

Rowe v. Bennett, 514 A.2d 802 (Me. 1986)

San Antonio Independant School Dist. v. Rodriquez, 411 U.S. 1 (1973)

Shofatall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973)

Simonetti v. School District of Philadelphia, 454 A.2d 1038, (Pa. Super. Ct. 1982), *appeal dismissed,* 473 A.2d 1015 (Pa. 1984)

Small v. Howard, 128 Mass. 131, 35 Am. R. 363 (1880)

Smith v. Alameda County Social Services Agency, 90 Cal. App.3d 929, 153 Cal. Rptr. 712 (1979)

Smothers v. Hanks, 34 Iowa 286 (1872)

Snow v. State of New York, 469 N.Y.S.2d 959 (A.D.2 Dept. 1983)

Sophia Elam v. College Park Hospital, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156, *modified,* 133 Cal. App. 3d 94a (1982)

Steeves v. United States, 294 F. Supp. 446 (D.C.S.C. 1968)

Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957)

Sullivan v. O'Connor, 363 Mass. 579, 296 N.E.2d 183 (1973)

Tanner v. Board of Trustees of the University of Illinois, 363 N.E. 2d 208 (1977)

Tefft v. Wilcox, 6 Kan. 33, 43 (1870)

The T.J. Hooper, 60 F.2d 737, 740 (1932)

T. T. Mansfield Construction Co. v. Goraline, Tex., 292 S.W. 187 (1927)

Versteeg v. Mowery, 72 Wash.2d 754, 435 P.2d 540 (1967)

Village Community School v. Adler, 124 Misc. 2d 817, 478 N.Y.S.2d 546, 548-549 (1984)

Wiggins v. Piver, 276 N.C. 134, 171 S.E.2d 393, 396 (1970)

Western Surety Co. v. Loy, 3 Kan. App.2d 310, 594 P.2d 257 (1979)

Weadock v. Eagle Indemnity Co., 15 So.2d 132 (1943)

Wood v. Strickland, 420 U.S. 308 (1977)

Youngverg v. Romeo, 457 U.S. 307 (1982)

Zumbrun v. University of Southern California, 25 Cal. App.3d 1, 100 Cal. Rptr. 499 (1972)

Bibliography of State Statutes

ALA. CODE
§ 16-3-3 (1995)
§ 16-4-14 (1995)
§ 16-6B-1 (1995)
§ 16-6B-2 (1995)
§ 16-6B-3 (1995)
§ 16-6B-7 (1995)
§ 16-23-1 (1995)
§ 16-23-2 (1995)
§ 16-23-16.1 (1995)

ALASKA STAT.
§ 14.20.010 (1992)
§ 14.20.370 (1992)
§ 14.20.380 (1992)
§ 14.20.480 (1992)
§ 14.48.010 (1992)
§ 14.48.020 (1992)
§ 14.48.060 (1992)

ARZ. REV. STAT. ANN.
§ 15-203 (Supp. 1997)
§ 15-521 (Supp. 1997)
§ 15-533 (Supp. 1997)
§ 15-741 (Supp. 1997)

ARK. CODE ANN.
§ 6-15-202 (Michie 1993)
§ 6-15-402 (Michie 1993)
§ 6-15-404 (Michie 1993)
§ 6-15-407 (Michie 1993)
§ 6-15-1005 (Michie 1993)
§ 6-17-401 (Michie 1993)
§ 6-17-403 (Michie 1993)
§ 6-61-111 (Michie 1993)
§ 6-61-114 (Michie 1993)

CAL. EDUC. CODE	§ 33126 (West 1993)	
	§ 44005 (West 1993)	
	§ 44225 (West Supp. 1997)	
	§ 44252 (West 1993)	
	§ 44256 (West 1993)	
	§ 44277 (West Supp. 1997)	
	§ 44292 (West 1993)	
	§ 44370 (West Supp. 1997)	
	§ 44371 (West Supp. 1997)	
	§ 44662 (West Supp. 1997)	
	§ 51216 (West Supp. 1997)	
	§ 51217 (West Supp. 1997)	
	§ 60601 (West 1989)	
	§ 60604 (West Supp. 1997)	
COLO. REV. STAT. ANN.	§ 22-2-106 (West 1990 & Supp. 1997)	
	§ 22-7-104 (West Supp. 1997)	
	§ 22-7-407 (West Supp. 1997)	
	§ 22-7-409 (West Supp. 1997)	
	§ 22-7-504 (West Supp. 1997)	
	§ 22-53-302 (West Supp. 1994)	
	§ 22-60-103 (West 1990)	
	§ 22-60-107 (West Supp. 1997)	
	§ 22-60-113 (West 1990)	
	§ 22-60.5-201 (West Supp. 1997)	
	§ 22-60.5-401 (West Supp. 1997)	
	§ 22-60.5-402 (West Supp. 1997)	
CONN. GEN. STAT. ANN.	§ 10-14n (West 1996)	
	§ 10-144d (West 1996)	
	§ 10-144o (West 1996)	
	§ 10-145f (West 1996)	
	§ 10-1456(West 1996)	
D.C. CODE ANN.	§ 31-1601 (1993)	
DEL. CODE ANN. tit. 14	§ 122 (1993)	§ 1202 (1993)
	§ 124A (Supp. 1996)	§ 1251 (1993)
FLA. STAT. ch.	229.57 (1997)	231.17 (1997)
	229.053 (1997)	231.24 (1997)
	229.512 (1997)	231.55 (1997)
	229.592 (1997)	231.546 (1997)
	231.15 (1997)	240.107 (1997)
GA. CODE ANN.	§ 20-2-200 (1996)	
	§ 20-2-281 (1996)	
	§ 20-2-282 (1996)	
	§ 20-2-791 (1996)	
	§ 20-2-792 (1996)	
	§ 20-2-984 (1996)	

HAW. REV. STAT.	§ 302A-501 (Supp. 1996) § 302A-602 (Supp. 1996) § 302A-618 (Supp. 1996) § 302A-802 (Supp. 1996) § 302A-1004 (Supp. 1996)
IDAHO CODE	§ 33-114 (1995) § 33-119 (1995) § 33-405 (1995) § 33-1204 (Supp. 1996) § 33-1252 (1995) § 33-1254 (1995) § 33-4501 (Supp. 1996)
ILL. ANN. STAT. ch. 105,	¶ 2-3.64 (Smith-Hurd Supp. 1996) ¶ 21-1 (Smith-Hurd Supp. 1996) ¶ 21-1a (Smith-Hurd 1993) ¶ 21-2 to ¶ 21-11.3 (Smith-Hurd 1993 & Supp. 1996) ¶ 21-2b (Smith-Hurd 1993)
IND. CODE ANN.	§ 20-1-1.2-2 (Burns 1996) § 20-1-1.2-6 (Burns 1996) § 20-1-1.4-2 (Burns 1996) § 20-3.1-10-3 (Burns 1996) § 20-6.1-1-8 (Burns 1996) § 20-6.1-2-1 (Burns 1996) § 20-6.1-2-2 (Burns 1996) § 20-6.1-3-1 (Burns 1996) § 20-6.1-3-10 (Burns 1996) § 20-10.1-16-4 (Burns 1996) § 20-10.1-16-5 (Burns 1996) § 20-10.1-16-7 (Burns 1996) § 20-10.1-16-13 (Burns 1996)
IOWA CODE ANN.	§ 256.11 (West 1996) § 272.1 (West 1996) § 272.2 (West Supp. 1997) § 272.20 (West 1996) § 272.25 (West 1996)
KAN. STAT. ANN.	§ 72-1371 (1992) § 72-9401 (1992) § 72-1388 (1992) § 72-9403 (1992) § 72-8501 (1992) § 72-9404 (1992) § 72-8505 (1992)
KY. REV. STAT. ANN.	§ 158.650 (Baldwin 1995) § 158.685 (Baldwin 1995) § 158.6453 (Baldwin 1995) § 161.030 (Baldwin 1995)

LA. REV. STAT. ANN.	§ 17.7 (West Supp. 1997) § 17.7.2 (West 1982 & Supp. 1997) § 17.24.4 (West Supp. 1998) § 17.391.4 (West 1982 & Supp. 1996) § 17.391.9 (West 1982)
ME. REV. STAT. ANN. tit. 20-A	§ 4511 (West 1993) § 4512 (West 1993) § 4517 (West Supp. 1996) § 6201 (West 1993) § 6203 (West 1993) § 6204 (West 1993) § 6207 (West 1993) § 13003 (West 1993) § 13012 to § 13014 (West 1993 & Supp. 1996) § 13013 (West Supp. 1994) § 13016 (West 1993)
MD. CODE ANN., EDUC.	§ 6-101 (1996) § 6-102 (1996) § 6-702 (1996) § 6-704 (1996) § 7-202 (1996) § 7-203 (1996) § 11-202 (1996)
MASS. GEN. LAWS ANN.	ch. 69 § 1 (West 1996) § 1B (West Supp. 1997) § 1D (West 1996) § 1I (West Supp. 1997) ch. 71 § 38G (West Supp. 1997)
MICH. COMP. LAWS ANN.	§ 380.1277 (West 1997) § 380.1279 (West 1997) § 380.1280 (West 1997) § 380.1531 (West 1997)
MINN. STAT. ANN.	§ 125.04 (West 1994) § 125.05 (West 1994 & Supp. 1997) § 125.182 (West 1994) § 125.185 (West 1994) § 126.666 (West 1994)
MISS. CODE ANN.	§ 37-1-2 (1996) § 37-3-2 (Supp. 1997) § 37-3-53 (1996) § 37-9-11 (Supp. 1997) § 37-16-1 (1996) § 37-16-3 (1996) § 37-16-7 (1996) § 37-17-6 (Supp. 1997) § 37-17-7 (1996)

MONT. CODE ANN.	§ 20-4-101 (1997)
	§ 20-4-102 (1997)
	§ 20-4-106 (1997)
MO. ANN. STAT.	§ 160.257 (Vernon 1991)
	§ 160.518 (Vernon Supp. 1998)
	§ 160.522 (Vernon Supp. 1998)
	§ 161.092 (Vernon 1991)
	§ 161.097 (Vernon 1991)
	§ 161.099 (Vernon Supp. 1998)
	§ 168.011 (Vernon 1991)
	§ 168.021 (Vernon 1991)
NEB. REV. STAT.	§ 79-703 (1996)
	§ 79-753 (1996)
	§ 79-808 (1996)
	§ 79-859 (1996)
	§ 79-866 (1996)
NEV. REV. STAT.	§ 385.347 (1996)
	§ 389.015 (1996 & Supp. 1997)
	§ 389.347 (1996)
	§ 391.011 (1996)
	§ 391.019 (1996)
	§ 391.031 (1996)
	§ 391.037 (1996)
	§ 391.038 (1996)
	§ 394.006 (1996 & Supp. 1997)
	§ 394.241 (Supp. 1997)
N.H. REV. STAT. ANN.	§ 21-N:1 (1989)
	§ 21-N:9 (1989)
	§ 186:8 (1989)
	§ 186:11 (1989)
	§ 193-C:1 (Supp. 1997)
	§ 193-C:3 (Supp. 1997)
	§ 193-C:6 (Supp. 1997)
N.J. STAT. ANN.	§ 18A:6-38 (1989)
	§ 18A:7C-1 (Supp. 1996)
	§ 18A:7C-2 (Supp. 1996)
	§ 18A:7C-6 (1989)
	§ 18A:7C-6.2 (Supp. 1996)
	§ 18A:7C-10 (1989)
	§ 18A:68-3 (Supp. 1997)

N.M. STAT. ANN.	§ 22-1-6 (Michie Supp. 1997) § 22-1-26.6 (Michie 1996) § 22-2-2 (Michie 1993 & Supp. 1997) § 22-2-8.4 (Michie 1993 & Supp. 1997) § 22-2-8.5 (Michie 1993) § 22-2-8.6 (Michie 1993 & Supp. 1997) § 22-10-3 (Michie 1993) § 22-10-9 (Michie 1993)
N.Y. EDUC. LAW	§ 3001 (McKinney 1995) § 3004 (McKinney 1995) § 3006 (McKinney 1995)
N.C. GEN. STAT.	§ 115C-12 (1997) § 115C-174.10 (1997) § 115C-174.11 (1997) § 115C-174.14 (1997) § 115C-295 (1997) § 115C-295.2 (1997) § 115C-295.3 (1997) § 115C-296 (1997) § 116-15 (1994)
N.D. CENT. CODE	§ 15-20.4-02 (1993) § 15-20.4-03 (1993) § 15-20.4-04 (1993) § 15-36-01 (Supp. 1995) § 15-38-16 (1993) § 15-38-18 (1993)
OHIO REV. CODE ANN.	§ 3301.07 (Anderson 1997) § 3301.07.10 (Anderson 1997) § 3301.07.11 (Anderson 1997) § 3301.07.14 (Anderson 1997) § 3319.23 (Anderson 1997) § 3319.24 to § 3319.28 (Anderson 1997)
OKLA. STAT. ANN. tit. 70	§ 3-104 (West 1998) § 3-104.4 (West 1998) § 6-101.21 (West 1998) § 6-184 (West 1998) § 6-185 (West 1998) § 1210.508 (West 1998) § 1210.531 (West 1998)
OR. REV. STAT.	§ 329.115 (1995) § 342.121 (1995) § 329.485 (1995) § 342.125 (1995) § 342.120 (1995) § 342.153 (1995)

PA. STAT. ANN. tit. 24	§ 1225 (1992)
	§ 1226 (1992)
	§ 2070.5 (Supp. 1997)
	§ 6705 (1992)
	§ 11-1101 (1992)
	§ 12-1201 (1992)
	§ 12-1201.1 (1992)
	§ 19-1902-A (1992)
R.I. GEN. LAWS	§ 16-1-5 (1996)
	§ 16-22-9 (1996)
	§ 16-40-1 (1996)
S.C. CODE ANN.	§ 59-5-60 (Law Co-op. 1990)
	§ 59-26-20 (Law Co-op. 1990)
	§ 59-26-30 (Law Co-op. 1990)
	§ 59-30-10 (Law Co-op. 1990)
S.D. CODIFIED LAWS ANN.	§ 13-3-51 (Supp. 1997)
	§ 13-3-55 (Supp. 1997)
	§ 13-4-1 (1991)
	§ 13-33-1 (1991)
	§ 13-42-1 (1991)
	§ 13-42-3 (Supp. 1997)
	§ 13-43-16 (1991)
	§ 13-43-25 (Supp. 1997)
TENN. CODE ANN.	§ 49-1-201 (1996)
	§ 49-1-211 (1996)
	§ 49-1-608 (Supp. 1997)
	§ 49-5-5201 (Supp. 1997)
	§ 49-5-5203 (1996)
	§ 49-5-5601 (1996)
	§ 49-5-5602 (1996)
	§ 49-5-5603 (1996)
	§ 49-5-5605 (1996)
	§ 49-5-5607 (1996)
	§ 49-6-6001 (1996)
	§ 49-7-2004 (1996)
	§ 49-7-2006 (1996)
TEXAS EDUC.CODE ANN.	§ 11.001 (West 1996)
	§ 21.003 (West 1996)
	§ 21.031 (West 1996)
	§ 21.041 (West 1996)
	§ 21.045 (West 1996)
	§ 21.048 (West 1996)
	§ 21.351 (West 1996)
	§ 39.022 to § 39.025 (West 1996)
	§ 39.053 (West 1996)
	§ 39.072 (West 1996)
	§ 39.073 (West 1996)

UTAH CODE ANN.	§ 53A-1-601 (1994)
	§ 53A-1-609 (1994)
	§ 53A-1a-103 (1994)
	§ 53A-6-101 (1994)
	§ 53A-7-102 (1994)
	§ 53A-7-110 (1994)
	§ 53A-11-602 (1994)
VT. STAT. ANN. tit. 16	§ 164 (Supp. 1997)
	§ 165 (Supp. 1997)
	§ 166 (Supp. 1997)
	§ 176 (Supp. 1997)
	§ 179 (Supp. 1997)
	§ 1692 (1989)
VA. CODE ANN.	§ 22.1-18 (Michie 1997)
	§ 22.1-19 (Michie 1997)
	§ 22.1-253.13:3 (Michie 1997)
	§ 22.1-253.13:14 (Michie 1997)
	§ 22.1-298 (Michie 1997)
	§ 22.1-299 (Michie 1997)
WASH. REV. CODE ANN.	§ 28A.150.240 (West 1997)
	§ 28A.230.190 (West 1997)
	§ 28A.305.130 (West 1997)
	§ 28A.320.205 (West 1997)
	§ 28A.410.010 (West 1997)
	§ 28A.410.020 (West 1997)
W.VA. CODE	§ 18-2-6 (Supp. 1997)
	§ 18-2E-4 (Supp. 1997)
	§ 18-2E-5 (Supp. 1997)
	§ 18-28-3 (Supp. 1997)
	§ 18A-1-1 (1997)
	§ 18A-3-1 (1997)
	§ 18A-3-2 (1997)
	§ 18A-3-3a (1997)
	§ 18A-3-3 (1997)
	§ 18A-3B-1 (1997)
WIS. STAT. ANN.	§ 115.28 (West Supp. 1997)
	§ 115.38 (West Supp. 1997)
	§ 118.19 (West Supp. 1997)
	§ 118.30 (West 1991 & Supp. 1997)
WYO. STAT.	§ 21-2-304 (1997)
	§ 21-2-401 (1997)
	§ 21-2-402 (1997)
	§ 21-2-801 (1997)
	§ 21-2-802 (1997)
	§ 21-7-102 (1997)

Bibliography of Federal Statutes

34 C. F. R. Chap. VI, Part 602

20 U. S. C. § 1400 to § 1454 (1982)

42 U. S. C. § 1983 (1988)

20 U. S. C. A. § 1232g. (Cum. Supp. 1976)

BIOGRAPHICAL SKETCH

I was born in Canton, Mississippi, twenty minutes after my twin brother David. Due to my father's progression with his company I had the opportunity to live in Alabama, Arkansas, and Mississippi. I graduated from Natchez-Adams High School in Natchez, Mississippi, and attended three years of college at Mississippi State College for Women, now Mississippi University for Women. Upon acceptance into the physical therapy program I transferred to University of Alabama, Birmingham, and completed the Bachelor of Science degree.

My first physical therapy position included work in a hospital, an extended care facility and rural home health. Over the years I have worked in a wide variety of practice settings including a neurological rehabilitation center, out-patient orthopedics clinics, a student health clinic, and sports medicine. In 1987 I moved from the clinic into the classroom and began teaching in the Physical Therapy Program at Medical College of Ohio in Toledo. Currently I am an assistant professor in the University of North Florida's Physical Therapy Program. My teaching areas include orthopedics, basic evaluation, kinesiology, and management.

I received a commission in the United States Air Force and served six years on active duty stationed in Montgomery, Alabama, and in Minot, North Dakota. After separating from active duty I joined the Air Force Reserves and continue to serve, currently holding the rank of lieutenant colonel. Like most Reservists, my civilian life was interrupted in 1991 by a three month tour of active duty during Desert Storm.

While stationed in Alabama I used the G.I. Bill educational benefits to complete the Master of Science at Troy State University in Montgomery. My doctoral studies began in curriculum and instruction at the University of Toledo in 1988. I anticipate completion of doctoral studies at the University of Florida in May 1998 in the Department of Educational Leadership.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

David S. Honeyman, Chair
Professor of Educational Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Joan L. Curcio, Cochair
Professor of Educational Leadership

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

C. Arthur Sandeen
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I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

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This dissertation was submitted to the Graduate Faculty of the College of Education and to the Graduate School and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

May 1998

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